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NO. 561

IN THE

Supreme Court of The United States

October Term, A. D., 1965

JAMES V. BROWN,
Petitioner,

VS.

WILLIAM J. THOMPSON, Judge of the Intermediate Court of Kanawha County, West Virginia, et als,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NO. _____

Supreme Court of The United States

October Term, A. D., 1965

JAMES V. BROWN,
Petitioner,
vs.
WILLIAM J. THOMPSON, Judge of the Intermediate Court of Kanawha County, West Virginia, et als,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner, James V. Brown, prays that a writ of certiorari be issued to the Supreme Court of Appeals of West Virginia, to review the judgment of that Court entered in the case styled "State of West Virginia, ex rel James V. Brown vs. William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondents."

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked on the basis that the Supreme Court of Appeals of West Virginia refused on petition for Writ of Prohibition, (Appendix II), to prohibit the trial of this case upon the indictment hereinafter set out, (Appendix I), and to prohibit trial upon any purported charges set out in said indictment. (See opinion of Supreme Court of Appeals of West Virginia, ... W. Va. ..... 142 SE 2d 711, Appendix IV, and order, Appendix V), and therefore refused to accord petitioner his constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Jurisdiction of this court is therefore invoked under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and in accordance with Rule 19 (a) of the Revised Rules of the Supreme Court of the United States and Title 28, Section 1257(3), U.S.C.A. as follows:

The Supreme Court of Appeals of West Virginia has decided a federal question of substance that has not yet been decided by the Suprme Court of the United States, to-wit: Is it a denial of due process of law to bring an accused to trial for alleged conduct which does not constitute a criminal offense?

The Supreme Court of Appeals of West Virginia has decided a federal question of substance in a way not in accord with the applicable decisions of the United States Supreme Court, to-wit: That the indictment

herein, (Appendix I), satisfies the constitutional requirement that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation.

JUDGMENT BELOW

The judgment from which petitioner seeks a writ of certiorari was entered by the Supreme Court of Appeals of West Virginia on the 15th day of June, 1965, finding that petitioner was not entitled to the writ of prohibition prayed for in his said petition, (Appendix V), and discharged the rule and denied the writ, which order had the effect of permitting respondents to proceed to try petitioner on the charge purportedly contained in the said indictment in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

On the 22nd day of June, 1965, the Supreme Court of Appeals of West Virginia entered an order, (Appendix VI), suspending the execution of the judgment entered on the 15th day of June, 1965, and the mandate of that court for a period of ninety days from June 15, 1965, in order to permit petitioner to apply to the Supreme Court of the United States for an appeal on writ of certiorari.

QUESTIONS PRESENTED

I.

Does it violate due process of law to try an accused on an indictment when there is no crime such as is charged in the indictment?

II.

Does an indictment purporting to charge accused as a principal in the second degree satisfy requirements of the Sixth and Fourteenth Amendments where the indictment fails to allege the presence or absence of the accused at the commission of the principal offense?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Fifth Amendment, provides in part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

The Constitution of the United States, Sixth Amendment, provides in part:

> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation."

The Constitution of the United States, Fourteenth Amendment, provides in part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, James V. Brown, was indicted at the January 1965 Term of the Intermediate Court of Kanawha County, West Virginia. The indictment charged one Ruth Maley, as principal, for falsifying accounts in violation of West Virginia Code, Chapter 61, Article 3, Section 22. Petitioner was indicted with her in the same indictment and in the same count thereof, being charged either as an aider and abettor or as an accessory before the fact. (Appendix I).

Petitioner, James V. Brown, is an attorney-at-law, who, after having practiced for a number of years his profession in Kanawha County, West Virginia, now resides in Washington, D. C. In the trial court below, petitioner filed a demurrer to the indictment and also a motion to quash said indictment. Petitioner's demurrer was overruled and, to his motion to quash the indictment, the State demurred, which demurrer of the State was sustained by the Trial Judge. The trial of your petitioner upon this indictment was initially scheduled before the Intermediate Court of Kanawha County, West Virginia, for March 24, 1965, however, said trial was stayed by order of the Supreme Court of Appeals of West Virginia, entered March 23, 1965, (Appendix III), upon filing therein a petition for Writ of Prohibition, (Appendix II).

After submission of briefs and oral argument on said petition, the Supreme Court of Appeals of West Virginia on June 15, 1965, discharged its rule entered on March 23, 1965, and denied the Writ of Prohibition.

RULING OF THE COURT BELOW

By denying petitioner's Writ of Prohibition and discharging the rule to show cause why respondents should not be prohibited from trying petitioner under said indictment, the Supreme Court of Appeals of West Virginia thereby did affirm and perpetuate the rulings and errors of the Intermediate Court of Kanawha County in overruling petitioner's demurrer to the indictment and in sustaining the State of West Virginia's demurrer to petitioner's motion to quash and thereby denied unto your petitioner his Constitutional rights.

POINTS RAISED FOR ALLOWANCE OF WRIT

The Indictment Under Which Petitioner Is Charged Is Void.

A. There is no crime of aiding and abetting or of being accessory before the fact to a charge made under Chapter 61, Article 3, Section 22 of the Code of West Virginia of 1931.

B. The indictment fails to charge a crime of aiding and abetting or accessory before the fact to a violation of Chapter 61, Article 3, Section 22 of the Code of West Virginia of 1931, in that it fails to allege either the absence of or the presence of petitioner at the commission of the principal offense.

C. The indictment fails to fully and fairly inform petitioner of the nature and cause of the accusation against him and it is void.

ARGUMENT AND AUTHORITIES

The Indictment Under Which Petitioner Is Charged Is Void.

A. THERE IS NO CRIME OF AIDING AND ABETTING OR OF BEING ACCESSORY BEFORE THE FACT TO A CHARGE MADE UNDER CHAPTER 61, ARTICLE 3, SECTION 22 OF THE CODE OF WEST VIRGINIA OF 1931.

(1) West Virginia Code, Chapter 61, Article 3, Section 22, under which Ruth Maley, as principal offender, is charged, reads in part as follows:

> "If any officer, clerk or agent of this state . . . make, alter or omit to make any entry in any book of accounts, or in any account kept by such state . . . with intent in so doing, to conceal the true state of any account . . . such officer, clerk or agent shall be guilty of a felony. . ."

The pertinent portions of the charge made against Petitioner is as follows:

> "Did feloniously counsel with, aid and abet the said Ruth Maley to do and commit the said felony in said Kanawha County, in the manner and form aforesaid."

Petitioner says that, under the Statute, Chapter 61, Article 3, Section 22, there can be no indictment for one who is alleged to have acted as an accessory before the fact or as an aider and abettor to the principal offender.

It would appear that the charge of falsifying accounts is one of statutory origin and did not exist as

an offense at the common law. Research of this question by counsel for petitioner has failed to disclose any such offense as falsifying accounts existent at common law. While not specifically so stating, it is pointed out that the case of *State* v. *Rouzer*, 127 W. Va. 392, 32 S. E. 2d 865 (1945), the only case to petitioner's knowledge, concerning itself with a construction of this statute, ueses the language "the crime established by the statute. . ." This would clearly indicate that this crime is one of statutory origin.

Therefore, if a statutorily created crime did not exist at common law, then there can be no crime of aiding and abetting or of being accessory before the fact to such crime, unless some statute specifically makes it a crime to aid or abet or be accessory before the fact to such crime.

Insofar as counsel for petitioner have been able to learn from their research of this matter, there is no case either in this State or outside this State where one has been charged as an aider or abettor or as an accessory before the fact to the crime of falsifying accounts.

In West Virginia, there is no general statute making it a crime to aid or abet or be accessory before the fact to the commission of an offense. The only statute of a general nature is that found at Chapter 61, Article 11, Section 6, which reads as follows:

> "In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree."

This statute does not create a crime but merely prescribes the mode or manner of punishment. In *State*

v. *Franklin*, 139 W. Va. 43, 79 S. E. 2d 692 (1953), syllabus 8 of the Court states:

> "Code 61-11-6, which provides, *inter alia*, that in the case of every felony, every principal in the second degree and accessory before the fact 'shall be punishable as if he was the principal in the first degree' simply provides how a person who acts as principal in the second degree in the commission of a felony shall be punishable."

It is clear, therefore, that West Virginia Code, Chapter 61, Article 11, Section 6, does not create a crime nor does it provide that one, acting as an accessory before the fact to an act in violation of a criminal statute, is guilty of the crime. It merely provides the punishment for those who, under the law, may be properly punished as an aider or abetter or accessory before the fact. This statute, in no wise creating a crime, has no application nor was it so intended to apply to a wholly statutory offense.

At the common law, a person who was an accessory before the fact or who aided and abetted the commission of a common law offense, was guilty of the principal crime. However, when a state has codified its criminal law, then in order to create a new crime, specific statutes, defining such new crime, must be passed by the legislature. The offense of falsifying accounts is a statutory offense. In order to make the crime of aiding and abeting or being accessory before the fact to this statutory crime, it is incumbent upon the legislature, by statute, to specifically so state. This has been particularly true in West Virginia as shown by the numerous criminal statutes which explicitly create the crime of being accessory before the fact or an aider

or abettor to a specific crime. There here follows an enumeration of some of these specific criminal statutes of the State of West Virginia which specifically make it a crime to aid and abet or be accessory before the fact to the specific enumerated crime:

(a) Kidnapping. West Virginia Code, Chapter 61, Article 2, Section 14 (d); this statute specifically makes an aider or abettor to the crime of kidnapping punishable as the principal.

(b) Dueling. West Virginia Code, Chapter 61, Article 2, Sections 19, 21 and 24; these statutes provide that any second to a duel shall be deemed an accessory before the fact; provided for the punishment of any person who carries the challenge to a duel and likewise provides for the punishment of one who, by taunting, seeks to bring about a duel.

(c) Arson. West Virginia Code Chapter 61, Article 3, Sections 1 through 5; these statutes specifically provide for those aiding and abetting or being accessory to the burning of property.

(d) False statement as to financial condition. West Virginia Code Chapter 61, Article 3, Section 37; the specific language used in this statute provides "any person who . . . makes or causes to be made, either directly or indirectly, . . . any false statement . . ."

(e) Obstructing an officer. West Virginia Code, Chapter 61, Article 5, Section 17; this statute specifically makes it a crime to counsel, advise, or invite others to hinder or obstruct an officer.

(f) Houses of Ill Fame and Assignation. West Virginia Code, Chapter 61, Article 8, Section 5; this statute specifically makes it a crime to aid, abet or participate in the crime of operating a house of ill fame.

(g) Incest. West Virginia Code, Chapter 61, Article 8, Section 12; this statute specifically makes both the male and female guilty of the crime; this is a strictly statutory offense and such would not have been necessary had the principles of common law aiding and abetting or accessory before the fact, been applicable.

(h) Policy or Numbers. West Virginia Code Chapter 61, Article 10, Section 11a; this statute specifically makes it a crime to aid, assist, or abet in any manner in any of the offenses, acts or matters named in the statute.

It is therefore clear that, in all these instances, our legislature, in defining the crime, has likewise seen fit to specifically make it a crime to aid and abet or be accessory before the fact. This, in and of itself, gives the strongest insight into the legislative intent surrounding the passage of Chapter 61, Article 3, Section 22. If the legislature had intended to make it a crime to aid or abet or be accessory before the fact to the crime of falsifying accounts, the legislature, as it did in all these other statutes, would have said so.

Criminal statutes must be such as to specify the person or persons intended to be punished. Pointing this up are the following West Virginia statutes: In Chapter 61, Article 25, Section 4, of the Code of West Virginia, those who offer or make promises of a bribe to certain designated public officials are deemed guilty

of a felony. Chapter 61, Article 5, Section 5, punishes those certain public officials who accept a bribe; the statutes clearly designates those persons who are chargeable with a crime as being the one who offers the bribe and the one who receives, and designates further the particular public officials, and no others, to whom a bribe can be made or who may receive same. Chapter 61, Article 5, Section 22, of the Code of West Virginia, prescribes the crime against any Clerk of a Court or other public officer who fraudulently makes a false entry. The following Section, Chapter 61, Article 5, Section 23, creates a crime against any person other than an officer to steal, fraudulently secrete or destroy a public record; the two Sections read together would punish either the public officer or one not an officer in order that the elements of punishment would not exist only against the Clerk of a Court or other public officer as stated in Section 22, but would include any other person as stated in Section 23. Chapter 61, Article 5, Section 24, creates an offense against a Sheriff or other officer to corruptly summons jurors to find biased verdicts. Chapter 61, Article 5, Section 25, creates an offense against any other person, other than an officer who procures the summonsing of biased jurors; here again the legislature includes different specific persons who may be guilty of this crime. Chapter 61, Article 10, Section 1, provides for the punishment of those who keep or exhibit gaming devices. Chapter 61, Article 10, Section 4, includes those specific persons who bet on the gaming devices prohibited in Section 1 of Article 10 of Chapter 61. Chapter 61, Article 10, Section 10, creates a crime against any person who promotes or

is connected with or is interested in the management or operation of any pool room, and includes his agents, servants or employees; this statute clearly states those persons against whom a charge is created by statute and none other. Chapter 61, Article 10, Section 15, of the Code of West Virginia, creates a crime against certain public officials who are pecuniarily interested in the proceeds of any contract or service of which he may have a voice or influence of control in procuring, and also creates an offense against any person who offers or gives compensation to the named officers to influence their vote or voice in obtaining contracts in which the public officer has a pecuniary interest.

The aforegoing criminal statutes are here cited for the purpose of pointing out the legislative intent to prescribe definitely those persons or class of persons the conduct of whom was intended to be regulated and punished and proscribed by the particular statute. It is fundamental law that a crime is not to be created by implication but that the intent and language of the particular statute must be controlling. *Bouie* v. *Columbia*, 378 U. S. 347, 12 Led. 2d, 894, 84 S. Ct. 1697. The principal offender in the instant case was presumably within the class of persons contemplated to be punished by Chapter 61, Article 3, Section 22. That statute, when viewed in the light of the specific designations of these other criminal statutes, plainly indicates that no other persons other than those designated as principal offenders were intended to be punished therefor. It is clear that the class of persons intended to be punished by Chapter 61, Article 3, Sec-

tion 22, is restricted to the named persons or class of persons. Note the language of the statute,

> ". . . such officer, clerk or agent shall be guilty of a felony . . ."

Nowhere does the statute, Chapter 61, Article 3, Section 22, either expressly or by implication suggest an intent to punish one who aids and abets the falsification of the account or one who is accessory before the fact thereto.

It is basic criminal law that crimes may not be created by statutory implication and every criminal statute must be strictly construed since criminal law deals with the most basic and fundamental concepts of ordered liberty and one cannot be deprived of his liberty by inferring the existence of a crime through a statute which does not specifically create it. Chapter 61, Article 3, Section 22, creates the crime of falsifying state accounts. It contains no reference to an accessory to that crime or to an aider or abettor of that crime. Thus it can be seen that since neither this statute nor the statute relating to accessory and aider and abettor creates the crime of aiding and abetting the falsification of state accounts, no such crime can exist.

The criminal law in West Virginia can only be derived from statutes, as evidenced by West Virginia Code, Chapter 61, Article 11, Section 3, which provides as follows:

> "A common law offense for which punishment is prescribed by statute shall be punished only in the mode so prescribed."

Once a crime that either did or did not exist at the common law has been codified, commission of that crime and punishment therefor can only be determined by a strict reading of the statute which reiterates or creates that crime. The crime of falsifying state accounts has been before the Supreme Court of Appeals of West Virginia only once in the State of West Virginia and the decision on that case evidences the extremely narrow and strict construction to be given to that statute. In *State* v. *Rouzer*, 127 W. Va. 392, 32 S. E. 2d 865 (1945), the Court in noting the narrowness of the statute stated:

> "This statute is a very old one. It can be traced back beyond the foundation of this state to the Virginia Code of 1849. Yet we are not able to find the report of any case brought to this court or to the Supreme Court of Virginia involving this statute. Evidently it has been found to be of little practical utility. A probable explanation of this phenomenon may be found in the extremely narrow scope of the statute itself."

The Court, in construing the statute, went on to hold that the word "kept" in the statute does not include records which "should have been kept" but only those records which were "actually kept". In keeping with this strict construction of the statute, the words "Make, alter or omit to make" cannot be deemed to include the words "cause to make". Absent those words in the statute, either expressly or by implication, the indictment in the instant case must fail since petitioner is not charged with making or altering but rather with aiding and abetting in such making or alteration.

The point is, there is no crime of aiding and abetting or being accessory before the fact to this statutory offense of falsifying accounts. Noted authorities in the field of criminal law have recognized the problem of the accessory to a statutory offense. *1 Burdick, Law of Crime*, Section 227, at page 309 (1946), recognizes that accessories before and after the fact in order to be chargeable with a crime in a statutory jurisdiction must be so cognizable by statute.

> "Yet, in a state where all offenses must be statutory, and the legislature has not declared that an accessory after the fact is punishable, there can be no prosecution of such common law offense."

Clark & Marshall, Law of Crimes, Section 8.04 (6th Ed. 1958) approaches the problem differently and notes that a distinction must be drawn between principals and accessories whether the offense is a common law or a statutory one. Realizing this distinction, would infer that if by statute it is made criminal to act as a principal in some manner, then since accessories are distinguishable from principals a similar statute would be necessary to create the crime of acting as accessory to such an act. The authors noted, grudgingly, that only one jurisdiction has held that a statute creating a crime for principal can also be made to apply to aiders and abettors, without specific reference thereto. *Commonwealth* v. *Carter*, 94 Ky. 527, 23 S. W. 344 (1893). However, even in that case the Court stated:

> "There can be no doubt of the correctness of the rule that in statutory offenses, where the plain intent of the statute is to inflict punish-

> ment only on the person actually committing the offense, others cannot be brought within its provisions as principals upon proof that they were aiders and abettors."

The Court in the Carter case goes on to cite an example of a statutory crime which cannot be extended to aiders and abettors. The Court states that when a statute refers to "anyone who" commits an act, this will be deemed to include aiders and abettors due to its broad import. However, when a statute refers to a specific class of persons such as "a woman delivered of issue of her body" (Frey v. Commonwealth, 83 Ky. L. Rep. 190, 1885) then such a statute cannot be held to include aiders and abettors, since it was obviously geared only to that specific class of persons referred to in the statute. Furthermore, the Carter case, *supra*, in proscribing this limited doctrine that a statutory crime may be held, in case of a broad, encompassing statute, to apply to aiders and abettors had to limit the doctrine of the earlier case of *Stamper* v. *Commonwealth*, 70 Ky. (7 Bush) 612, 1870, which had held that a statutory offense must specifically include, by appropriate language, aiders and abettors in order to hold them cognizable under such a statute.

If the test enunciated in the Carter case, *supra*, is to be considered then we must look at the words of the statute under which petitioner is charged. The statute refers to "officer, clerk or agent of this state". This clearly confines liability under the statute to a specific class of people, therefore whether petitioner belongs to this class is material and since the statute is narrow in scope, as was held in the Rouzer case, *supra*, and

since it extends liability only to a limited class of persons it cannot be deemed to include aiders and abettors, or, for that matter, accessories before the fact.

An interesting case bearing on this question from another jurisdiction is *State* v. *Lingfelter*, 77 Ohio St. 523, 83 N. E. 897 (1908). Defendant was charged with being an accessory after the fact to forgery. In reversing the jury's verdict of guilty, the Court stated:

> "It often has been decided by this Court that we have no common law crimes in Ohio; that the General Assembly has taken the responsibility of defining what acts or omissions are crimes and offenses in this state, and of prescribing suitable penalties in case of guilt . . . Therefore we have in law no accessories after the fact. Whenever and wherever the Legislature has deemed it necessary to penalize the acts which are done or performed after the commission of the principal offense, it has enacted statutes to meet the case, and such acts are made a substantive offense as distinguished from the relation of accessory after the fact as recognized at common law, as in cases for receiving stolen goods and the like."

This commentary is valuable not only for the rule of law stated but for the sheer logic in reaching such a conclusion. If a jurisdiction whose criminal law is based strictly on statutes, creates a crime that did not exist at the common law, then the common law appendages to crime, such as accessories and aiders and abettors cannot possibly attach to such a statutorily created crime since no punishment under the common law would be permissible. The State of Oklahoma has

reached a similar conclusion. See *Vann* v. *State*, 21 Okla. Crim. 298, 207 Pac. 102 (1922).

Furthermore the decisional law of the State of West Virginia is replete with decisions holding that an indictment must fail, if, in words, it attempts to enlarge a particular statutory offense.

In *State* v. *Riffe*, 10 W. Va. 794 (1877) the statute upon which the charge was brought concerned the issuance of a license before a particular act. The indictment used the words "state license". The Court held:

> "Where the words used in an indictment to describe an offense are commonly used in a sense which does not necessarily import an offense, and they are used without any qualification, the indictment is bad though the same words, in a more strict and technical sense may describe a criminal act. . . .
>
> "If the indictment may be true, and still the accused may not be guilty of the offense, the indictment is insufficient, even though it falls within the class to which the provision aforesaid refers. . . .
>
> "Whilst it is true, equivalent words may be used in lieu of the statutory description of the offense, yet it is dangerous as tending not only to material inaccuracies in substance, but also to irregularity in matters of form. But if the words of the statute are not employed, other words clearly equivalent must be used, so as to bring the offense charged within the provision and limitations of the statute defining or creating it."

It is possible that in some instances additional language which goes beyond the purview of a statute may be rejected as mere surplusage, but in the case at bar the additional words go to the very essence of the offense charged.

In *State* v. *Massie*, 72 W. Va. 444, 78 S. E. 382 (1913) the Court stated:

> "And while immaterial averments may be rejected there cannot be a rejection as surplussage of an averment which is descriptive of the identity of that which is legally essential to the claim or charge and this includes those allegations which operate by way of description or limitation on that which is material."

The Court further noted that "we cannot reject as surplussage, what may have been the ground of the conviction."

In *State* v. *Porter*, 25 W. Va. 685, (1885), the defendants were charged with conspiring for the purpose of stealing the personal property of another. In discussing the indictment the Court held that the statute did not make it a crime of conspiracy to obtain money under false pretenses by the use of a plan or scheme. It was held:

> "No man incurs a penalty unless the act, which subjects him to it, is clearly both within the spirit and the letter of the statute imposing such penalty. If this rule is violated, the fate of accused persons is decided by the arbitrary discretion of judges and not by the express authority of the law."

In the recent case of *State* v. *Gargiliana*, 138 W. Va. 376, 76 S. E. 2d 265 (1953), the defendant was charged in an indictment with attempting to commit the crime of sodomy. The statute under which the charge was brought did not make the attempt to commit sodomy a crime. The Court stated:

> "Accused cannot be charged with one crime and convicted of another merely because the latter is developed out of the proof, which fails to establish the crime charged in the indictment."

The situation in the case at bar is slightly different since the indictment charges a crime in one instance and no crime in another, the two being alleged conjunctively in the indictment. A verdict of guilty could be entered by the jury if they believed either allegation to be true.

Thus it has been shown that the statute under which the defendants were indicted does not create the crime of being an accessory before the fact or an aider and abettor to the crime of falsifying state accounts, and thus, the indictment is void.

There is one other case decided by the Supreme Court of the State of West Virginia which should be mentioned as authority for the proposition that a criminal statute must include those persons who are sought to be punished before that person can be charged with a crime under a particular statute. A very similar statute to Chapter 61, Article 3, Section 22 is found in Chapter 61, Article 5, Section 22 of the Code. That Section creates an offense against "any clerk of a court,

or other public offiicer" who fraudulently makes a false entry in certain public records. In *State* v. *Harrison*, 130 W. Va. 246, 43 S. E. 2d 214, the Court in interpreting Chapter 61, Article 5, Section 22 of the Code stated:

> "All the mentioned persons and things may be readily ascertained and determined by any one of ordinary intelligence and experience. The statute designates the character of the clerk or other officer against whom its prohibition is directed."

In so stating the foregoing, this Court, in the Harrison case, precluded a charge against any person other than the named class, and precluded a charge against any one who was an aider and abettor or accessory before the fact to the crime created in that Section of the Code.

We have heretofore, from authorities and statutes in West Virginia, concluded that, in order to create the crime of aiding or abetting or accessory before the fact to a criminal offense, it is necessary for the legislature to so state in the particular criminal statute. We shall now offer for the Court's consideration certain statutes of other jurisdictions which will lend themselves to the same conclusion. The statutes of other jurisdictions have been distinguished herein into three categories. These three categories are:

1. Those states which, by general statute, have created a crime of aiding and abetting or accessory before the fact of any felony.

2. Those states which have general statutes similar to Chapter 61, Article 11, Section 6 of the Code of West Virginia, which merely prescribe the punishment as an aider and abettor or accessory before the fact, but do not create the crime against either.

3. Those states which have no statute either creating a crime of aiding and abetting or accessory before the fact, nor do they have a statute which prescribes the punishment.

Those statutes falling within the first category are as follows:

Title 14, Section 14, Alabama Code; Section 41-118, Code of Arkansas; Section 44-1107, Code of Arizona; Section 971, Code of California; Chapter 40, Article 1, Section 12, Code of Colorado; Section 54-196, Code of Connecticut; Chapter 1, Section 102, Code of Delaware; Section 776-02, Code of Florida; Section 8845, Code of Idaho; Chapter 38, Article 5, Sections 1 and 2, Code of Illinois; Section 9-102, Code of Indiana; Section 688.1, Code of Iowa; Section 24, Louisiana Criminal Code; Chapter 132, Section 2, Code of Maine; Chapter 274, Sections 2 and 3, Code of Massachusetts; Section 767.39, Code of Michigan; Section 609.5, Code of Minnesota; Section 4599, Code of Missouri; Section 94-204, Code of Montana; Section 28-201, Code of Nebraska; Section 9958, Code of Nevada; Chapter 40 A, Article 1, Section 14, Code of New Mexico; Article 2, Section 20 and 27 of the Criminal Code of New York; Chapter 14, Article 2, Section 5 of the Code of North Carolina; Chapter 12, Article 2, Sections 3,

4 and 6 of the Code of North Dakota; Chapter 4, Section 172 of the Code of Oklahoma; Section 23-202, 206 of the Code of Oregon; Section 5105 of the Code of Pennsylvania; Chapter 11, Article 1, Section 3 of the Code of Rhode Island; Sections 1936 and 1937 of the Code of South Carolina; Section 3594 of the Code of South Dakota; Section 39-108 of the Code of Tennessee; Chapter 2, Article 70 of the Code of Texas; Chapter 76, Article 1, Section 44 of the Code of Utah; Chapter 1, Section 4, of Title 13 of the Code of Vermont; Section 9.01.030 of the Code of Washington; Section 353.05 of the Code of Wisconsin; Section 6-14 of the Code of Wyoming; Section 18.1-11, Code of Virginia.

In all of the foregoing states, the common law distinctions of principals in the second degree and aiders and abettors have been generally discarded. Generally, their penal statutes do not contain any reference to aiders and abettors or accessories before the fact to any particular crime. The general statute creating the offense of aiding and abetting and accessory before the fact, make any reference unnecessary in the particular penal statutes to render such persons includable as offenders.

The second category of statutes from other jurisdictions includes those states which have general statutes providing for the punishment of an aider and abettor or accessory before the fact, but do not create the offense. These statutes are similar to Chapter 61,

Article 11, Section 6, of the Code of West Virginia, and are as follows:

Section 6, Article 2, Criminal Code of Georgia.
Section 21-105, Code of Kansas.
Section 431-160, Code of Kentucky.
Section 1995, Code of Mississippi.
Section 590:1, Code of New Hampshire.
Chapter 2A:85-14, Code of New Jersey.
Section 1.17, Code of Ohio.

These particular Code provisions of other jurisdictions make it necessary for the legislature to create the crime of aiders and abettors or accessories before the fact in each criminal statute in which it is intended that they are to be punished as the principal offenders.

Section 284 of the Criminal Code of Georgia creates an offense against any public officer or other person who alters or falsifies any record or any book belonging to any public office within the state, and creates further an offense against those who aid and abet or are accessories before the fact to the principal offender.

Section 21-17 of the Kansas Code creates an offense of altering an account, and creates further an offense against those aiding and abetting or acting as an accessory before the fact to the principal offender.

It is clear that where states have statutes merely providing for the punishment of aiders and abettors or accessories before the fact, in order to create an offense against the aider and abettor or accessory before the fact, the individual criminal statute should so state.

The third category of statutes from other jurisdictions includes but one State, that is the State of Maryland. Maryland does not have any general statute which either provides for the punishment of an aider and abettor or accessory before the fact, nor does it have a general statute which creates the offense against either. Yet, where it is intended that the aider and abettor or accessory before the fact is to be punished, the particular criminal statute includes him in specific language as a party that can be charged with such offense.

We therefore reach the same conclusion from an analysis of these statutes, that Chapter 61, Article 3, Section 22, of the Code of West Virginia, does not create a crime against an aider and abettor or accessory before the fact in the absence of specific language within the statute. It was not the intent of the legislature to punish any person other than those specifically named therein.

In addition, the crime of falsifying accounts did not exist at common law nor did the crime of aiding and abetting or accessory before the fact to the crime of falsifying accounts. This Court, in *State* v. *Digman*, 121 W. Va. 499, 5 S. E. 2d 113, in holding that a man can be charged and convicted as a principal in the second degree to raping his wife, held:

> "By an examination of the authorities, we reached the conclusion that our statutory definition of the crime of rape was nothing more than an adoption of the integral parts of the common law definition. For this reason, because at common law, a man could be guilty as

> principal in the second degree of raping his own wife, we are of the opinion that the rule is equally applicable under our statute."

Therefore, if aiding and abetting or accessory before the fact to the crime of falsifying accounts did not exist at common law, then the aider and abettor or accessory before the fact cannot be charged to this purely statutory offense unless the statute would so provide.

Supporting the proposition that the legislature had it intended to make punishable an aider or abettor or an accessory before the fact it would have said so are the statutes and decisions thereunder having to do with the sale of intoxicating liquors.

5 A. L. R. *Annotated, Crime - Incapacity - Aiding,* at page 786, it is stated:

> "A purchaser of intoxicating liquors is not guilty of inciting, aiding, or abetting, counselling, or procuring the sale thereof to himself. The reason for this rule is that a sale contemplated a purchaser, and therefore the legislature would have made it an offense if they had intended it so to be."

In *Commonwealth* v. *Willard* (1839), 22 Pick. (Mass.) 476, it was held that the buyer was not indictable under a statute which prohibited the sale of liquors. At page 787 of 5 A. L. R., it is stated:

> " 'No such prosecution', to borrow the language of Chief Justice Shaw . . . in Massachusetts has been attempted within the knowledge

> of the court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of the buyers. The Chief Justice . . . thought that the principle might be limited to offenses which are mala in se, in contradistinction to mala prohibita, or acts otherwise indifferent than as they are restrained by positive law."

To like effect see the annotation contained in 68 A. L. R. - *Intoxicating Liquors - Purchasers Culpability*, page 896.

It is pointed out that Chapter 61, Article 3, Section 22, has been on the books apparently since 1849. In only one instance since that time, as far as we can ascertain, has any charge been made under that statute. In no instance that has reached the appellate court has anyone been charged as an aider or abettor or accessory before the fact to the crime prohibited by that statute. Adopting the apparent reasoning of Chief Justice Shaw of Massachusetts this would tend to exhibit the narrowness in scope of this statute so as to make persons not named therein not indictable.

In only one case to petitioner's knowledge has there been any direct language indicating that there might be a common law offense of aiding and abetting, a purely statutory crime. That case is *Adkins* v. *Commonwealth*, 175 Va. 590, 9 S. E. 2d 349 (1940). It is significant to note that in that case the principal crime alleged was that of bigamy, which clearly was an offense at the common law. That bigamy was a com-

mon law offense is shown in *State* v. *Breuer*, ... S. Car. ....., 102 S. E. 15 (1920), wherein at page 16, it is stated:

> "The offense was a felony at common law. (4 Blackstone 464), . . . "

The decision in the Adkins case proceeds on the basis that bigamy was not an offense at common law.

It is stated in the Opinion that Virginia has a statute unlike that of West Virginia which creates an offense against an aider and abettor or accessory before the fact, that statute is Section 4764 of the Virginia Code which provides

> "In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects, as if a principal in the first degree. . . . "

This statute would create the crime of accessory before the fact or aiding and abetting to the crime of bigamy in Virginia without the verbose discussion of the Court in straining to apply an offense of aiding and abetting or accessory before the fact to the crime of bigamy.

It is further of like import that all of the language of the Virginia Court concerning the application of

the accessories before the fact and aider and abettors to the crime of bigamy must be dicta, since the case turned upon the question of double jeopardy.

At page 353 of the *Southeastern 2d Reporter*, the Virginia Court stated:

> "When the legislature creates a statutory offense, does its failure to provide for the guilt of accomplices indicate an intent to exclude such parties from criminal responsibility? We believe that in answering this question a distinction should be noted between offenses necessarily involving the cooperative action of two or more persons and offenses which may be committed by one person alone."

The statutory crime of bigamy as discussed in the Adkins case falls within the former class of cases, and this is what the Court in the Adkins case was concerned with. Chapter 61, Article 3, Section 22 of the Code of West Virginia, the offense with which we are concerned, falls into the latter class of cases. Obviously, the Adkins opinion is no authority for an interpretation of this Court of Chapter 61, Article 3, Section 22 of the Code of West Virginia.

It is therefore respectfully submitted that this Court should approach the issues involved in this case upon the basis of decisions and statutes other than *Adkins* v. *Commonwealth*, 175 Va. 590, 9 S. E. 2d 349.

B. THE INDICTMENT FAILS TO CHARGE A CRIME OF AIDING AND ABETTING OR ACCESSORY BEFORE THE FACT TO A VIOLATION OF CHAPTER 61, ARTICLE 3, SECTION 22, IN THAT IT FAILS TO ALLEGE EITHER THE ABSENCE OF OR THE PRESENCE OF PETITIONER AT THE COMMISSION OF THE PRINCIPAL OFFENSE.

Petitioner, James V. Brown, is not charged with being a principal offender in violation of Chapter 61, Article 3, Section 22, to the contrary, he is charged in the following language, that he

> ". . . did feloniously counsel with, aid and abet the said Ruth Maley to do and commit the said felony in said Kanawha County in the manner and form aforesaid, . . . "

It is necessary for a proper determination of this issue to recognize the legal distinction between an aider and abettor and one who is an accessory before the fact. The aider and abettor or principal in the second degree must be actually or constructively present at the commission of the principal offense.

An indispensable element characterizing the accessory before the fact is that he must be absent and cannot be present at the commission of the principal offense.

The leading case in the State of West Virginia charging a defendant as an accessory before the fact

is *State* v. *Loveless*, 140 W. Va. 875, 87 S. E. 2d 273 (1955), wherein it is stated:

> "An accessory before the fact is he that, being absent at the time of the actual perpetration of the crime, prescribes, counsels, commits, incites, or abets another to commit it. . . . The crime of accessory before the fact is a particular one. *The absence of the accessory at the time and place of the principal offense is an essential element.* . . ." *State* v. *Roberts*, 50 W. Va. 422, 40 S. E. 484. (emphasis supplied)

The law is clear that, before a person can be convicted as an accessory before the fact or an aider and abettor, he must be indicted as such. *State* v. *Davis*, 139 W. Va. 645, 81 S. E. 2d 95. *State* v. *Loveless*, 140 W. Va. 875, 87 S. E. 2d 273. *State* v. *Cremeans*, 62 W. Va. 134, 57 S. E. 405. *State* v. *Roberts*, 50 W. Va. 422, 40 S. E. 484. *State* v. *Stafford*, 89 W. Va. 301, 109 S. E. 326.

The indictment in the instant case charges the petitioner with counseling and aiding and abetting. These words have been considered by the Courts of West Virginia in charging defendant as an accessory before the fact. In *State* v. *Davis*, 139 W. Va. 645, 81 S. E. 2d 95 (1954), the words "aid and abet" in an indictment charging "did feloniously counsel, hire, procure, aid and abet" were held to be mere surplussage and the indictment was deemed to charge the defendant as an accessory before the fact.

The words of the indictment in the case at bar are certainly ambiguous, as the petitioner is unable to ascertain whether he is being charged as accessory or

with aiding and abetting. If, as appears from the Davis case, *supra*, he is being charged as accessory, then absence of the petitioner at the time of the commission of the crime is a necessary allegation.

An indictment, in order to properly apprise the defendants of the charges against them, must allege all the necessary elements of the crime with which they are being charged. Notwithstanding the liberality accorded the prosecution in drafting an indictment and although words which are deemed mere surplussage will not void an indictment nevertheless an indictment must fully and plainly inform the defendants of the character and cause of the accusation. West Virginia Constitution, Article III, Section 14. *State* v. *Johnson*, 134 W. Va. 357, 59 S. E. 2d 485 (1950).

The essential elements of the crime of accessory before the fact are clearly enunciated in Clark & Marshall, *Crimes, Section* 8.03, page 454 (6th Ed. 1958) and are recognized by the Courts of West Virginia as shown by the Loveless, Roberts and Davis Cases, *supra*.

> "An accessory before the fact is one who procures, commands or counsels the commission of a felony by another, but who is not present either actually or constructively, when the felony is committed. To constitute one an accessory before the fact, (1) there must be a guilty principal in the first degree, (2) *the accessory must be neither actually nor constructively present when the offense is committed*, and (3) there must be some participation by way of procurement, command or counsel." (Emphasis supplied)

Therefore, to properly charge a defendant as an accessory before the fact, the indictment must specific-

ally allege that the defendant was not present either actually or constructively at the time of the commission of the crime.

One of the few cases in the United States considering the necessity of this allegation directly is *State ex rel Dooley* v. *Coleman*, 126 Fa. 203, 270 So. 722 (1936.) It was stated therein.

> "One who aids in the commission of a felony is a principal in the second degree and must be actually or constructively present at the commission of the crime; and such presence must be alleged in the information or indictment. It is alleged that petitioners aided in the commission of a felony by furnishing telephone facilities knowing they would be used in the unlawful operation of a place for gambling. The information does not allege the presence of the alleged aiders or their participation in the commission of the felony."

Thus, if the petitioner in the instant case is charged with aiding and abetting to-wit, as a principal in the second degree, it was necessary for the prosecution to allege his actual or constructive presence at the scene of the crime, and similarly if the charge is of being an accessory, absence was every bit as essential an allegation for a valid indictment. See 27 Am. Jur., Indictments and Information, Section 95, which cites the Dooley Case, *supra*, with approval.

The case of *Penney* v. *State*, 140 Fa. 155, 191 S. 190 (1939) stands for the proposition that an indictment cannot charge an accused as a principal in the second degree unless it specifically states that the defendant was present when the crime was committed.

In 42 C.J.S., *Indictments and Information*, Section 148, at page 1075, appears the following:

> "Following the charge of the principal crime the facts showing that the party charged is an accessory must be alleged. An indictment adequately charging the principal with the commission of the crime, and concluding by charging accused with aiding, abetting, advising, and encouraging its commission, although not present, is a good indictment against accused as an accessory before the fact. . .
>
> "However, under a statute defining an accessory before the fact as one who, not being present aiding, abetting or assisting, has advised and encouraged the perpetration of the crime, it is not necessary to allege that accused, charged as an accessory before the fact, was not present at the commission of the crime, although to charge accused as a principal in the second degree, his presence at the scene of the crime at the time of its commission must be alleged, as discussed supra, Section 147."

It is seen therefore that, if there is a statute defining accessory before the fact as one who was not present, etc., then it is not necessary to allege that the accused was not present. Here we have no such statute and therefore the indictment must allege the accused was not present if he is being accused of being an accessory before the fact, or, as previously stated, that he was present if he is charged with aiding and abetting.

It goes on to state, in 42 C.J.S., *Indictments and Informations*, Section 148, at page 1075.

> "In charging one as an accessory before the fact, the indictment or information should

> clearly and plainly show that accused is charged as such, as distinguished from a principal in the second degree."

And continuing at page 1078

> "If the pleader is doubtful as to whether the accessory was present aiding and abetting or was absent, both of such modes should be alleged."

The case of *Kauz* v. *State*, 98 Fla. 687, 124 So. 177 (1929) is particularly enlightening on this point. The Court stated therein:

> "The question of presence, actual or constructive, is the determinative factor between an accessory before the fact and a principal in the second degree. Such a vital element of distinction must be plainly charged, if it is intended to charge the defendant as a principal in the second degree."

Therefore, since the indictment is unclear as to whether the petitioner is charged as accessory before the fact or principal in the second degree, and since neither the presence nor absence of petitioner at the scene of the crime is alleged, the indictment is unclear and ambiguous and must fail.

Petitioner from the indictment against him cannot tell whether he is charged as an accessory before the fact or an aider and abettor. The law is clear that to be an accessory before the fact he cannot have been present at the commission of the principal offense while if he is an aider and abettor he must have been either actually or constructively present.

The indictment under which petitioner is charged asserts that he did "feloniously counsel with, aid and abet the said Ruth Maley. . ."

In *State* v. *Davis*, 139 W. Va. 647, 81 S. E. 2d 95, (1954), the defendant was charged that he

"did feloniously counsel, hire, procure and abet" two others in the commission of a criminal abortion. At page 100 of the *Southeastern 2d Reporter*, the Court stated:

> "We bear in mind that the indictment on which this trial was had was an indictment against the defendant herein for being an accessory before the fact to criminal abortion. It is to be noted that there is a clear distinction between the crime of accessory before the fact and the crime of aiding and abetting. An accessory before the fact must be absent at the time and place of the principal offense. State v. Ellison, 49 W. Va. 70, 73, 38 S. E. 574; State v. Roberts, 50 W. Va. 422, 426, 40 S. E. 484. An aider or abettor is one who is present at the time and place of the commission of the crime. Foster v. Commonwealth, 179 Va. 96, 18 S. E. 2d 314. See The Criminal Trial in the Virginias, § 788 and § 803. 1 Brill Cyclopedia Criminal Law, § 240 and § 241; 14 Am. Jur. Criminal Law, § 95 and § 96. It was therefore inept to charge the defendant in this case with aiding and abetting. But the words 'aid and abet' may be rejected as immaterial surplusage. . ."

From the foregoing case it is clear that if petitioner is charged in the instant indictment as being an accessory before the fact then there must be deleted from the indictment as surplusage the words "aid and abet". This leaves petitioner charged only that he "did coun-

sel with . . . Ruth Maley to do and commit the said felony . . ." In every instance where one has been indicted as an accessory before the fact as disclosed by the research of counsel for petitioner and the cases cited within this brief, the indictment has included other words such as procured, incite, instigate, encourage, assist and others of like import; not one case, to petitioner's knowledge, has included an indictment for an accessory before the fact which utilized the single charge of "counselling with". It is respectfully urged that this charge alone of "counselling with" is insufficient to charge petitioner as an accessory before the fact.

In the instant case petitioner is an attorney at law and, as such, his duties require him to counsel with each and every client who calls upon him for his professional services. It is inconceivable that the law should contemplate punishment for such conduct, as to do so would be to impose penal sanctions upon conduct which is lawful and which constitutionally cannot be punished; such construction or interpretation of the law having to do with accessory before the fact would impose an insurmountable enforcement problem, inasmuch as every attorney practicing at the bar of this Court, or any other Court, who counsels with a client, as he must, could, in numerous instances, be subjected to a charge such as we have here.

If the indictment under which petitioner is charged is intended to charge him as an aider and abettor to the principal offense the indictment is likewise insufficient because of its failure to allege the necessary elements of that crime; an indispensable element to the crime of aiding and abetting is that the accused must have

been present either actually or constructively at the time of the commission of the principal offense. It is fundamental criminal law that the State must allege and prove each and every material element of the offense charged. Consequently, in order for this indictment to charge petitioner as an aider and abettor it must allege that he was either actually or constructively present at the time of the commission of the principal offense, this it does not do and therefore it must fail.

C. THE INDICTMENT FAILS TO FULLY AND FAIRLY INFORM PETITIONER OF THE NATURE OF THE ACCUSATION AGAINST HIM AND IT IS VOID.

The Sixth Amendment of the Constitution of the United States provides in part:

> "In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation. . ."

The indictment under which petitioner James V. Brown is charged fails to disclose upon its face the offense for which he is charged. A reading of the indictment would seem to indicate that he is charged either as an aider or abettor or accessory before the fact. The law is abundantly clear that these are two distinct and separate and independent offenses. In addition, these two offenses are mutually repugnant one to the other in that to effectively charge one as an aider and abettor, it is necessary that his presence at the commission of the principal offense be alleged, whereas to effectively charge him as an accessory before the fact to the commission of the principal offense, his absence must be

alleged. In the instant indictment, neither the absence nor the presence of petitioner is alleged and, consequently, it cannot be told from the indictment as to the offense the State intends to charge. Surely the State is not permitted to so charge a defendant that he may be found guilty of one of two separate and distinct offenses, depending upon what the proof at trial may be. In *State* v. *Gargiliana*, 138 W. Va. 376, 76 S. E. 2d 265 (1953), at page 271 of the Southeast Second Reporter, the Court stated:

> "In 23 C.J.S., Criminal Law, § 1400, it is stated that 'Accused cannot be charged with one crime and convicted of another merely because the latter is developed out of the proof, which fails to establish the crime charged in the indictment. . . .' "

The rationale of the law in requiring an accused to be plainly and fully informed of the character and cause of the accusation made against him is two fold: (1) the accused must be so informed in order that he may adequately and properly prepare his defense to the charge made against him; (2) the charge made against him must be so clear and explicit that, in the event he is tried and either convicted or acquitted upon the charge made against him, he subsequently can plead the same in bar of a second charge of the same offense.

The manner in which petitioner is charged in the instant indictment contravenes his rights in both these regards.

CONCLUSION

From the foregoing authorities, it is respectfully submitted that the indictment under which petitioner is charged, is void because there is no crime existent in the State of West Virginia as that which the State attempts to charge. This is born out first in that Chapter 61, Article 3, Section 22 is a strict statutory offense. It is limited in scope to the persons or class of persons therein named and does not either by express language or implication, create an offense against aiders and abettors or accessories before the fact to falsify any accounts. Further evidencing the fact that the legislature of the State of West Virginia intended to create no such offense as is charged against James V. Brown is the fact that said legislature, in so many other of our criminal statutes, has seen fit to specifically set out and create the crime of aiding and abetting or being accessory before the fact to the principal offense. This same conclusion is arrived at by looking also to the statutes of other states wherein the crime of aiding and abetting or accessory before the fact either exists by virtue of a general statute or the specific criminal statute creates that offense.

It is further urged that the indictment in the instant case is void because it fails to charge a crime against petitioner. It is of course fundamental law that every essential element of the offense charged must be alleged. The law is absolute that, to be an aider or abettor, the accused must have been actually or constructively present at the commission of the offense or, if he be deemed an accessory before the fact, he must have been absent.

The indictment in the instant case fails to allege either petitioner's absence or his presence.

The indictment is further void upon the basis that it fails to fully and plainly inform the accused of the character and cause of the accusation against him, and because of its vague and indefinite nature, precludes the petitioner from adequately preparing a defense to the charge therein contained and is such that, following a verdict either for or against him, he would be precluded from pleading the same in bar to another charge arising out of the same offense if such should occur.

For the reasons herein given petitioner therefor respectfully submits that the judgment of the Supreme Court of Appeals of West Virginia should be reversed with directions that the Writ of Prohibition therein requested should be awarded.

Respectfully submitted,

STANLEY E. PREISER
Third Floor, Union Building
Charleston, W. Va.

and

ARTHUR T. CICCARELLO
L & S Building
Charleston, W. Va.

Counsel for Petitioner

APPENDIX I

INDICTMENT

State of West Virginia, Kanawha County, ss:

IN THE INTERMEDIATE COURT OF SAID COUNTY:

The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, that within three years prior to the date of the finding of this indictment, in the County of Kanawha, State of West Virginia, RUTH MALEY, being then and there an employee, officer, clerk and agent of the State of West Virginia, did knowingly, unlawfully and feloniously make and cause to be made false entries in the written accounts kept by the State of West Virginia by preparing and submitting, and causing to be prepared and submitted, false transmittal sheets in writing accompanied by false statements and invoices in writing for Pioneer Construction Co., Inc., a corporation, to the Auditor of the State of West Virginia, which said written accounts, statements, invoices and transmittal sheets were kept by the said State of West Virginia, with intent in so doing to falsify, alter and conceal the true state of said written accounts against the peace and dignity of the State.

And the Grand Jurors upon their oaths aforesaid do further present that ALEX DANDY, JAMES V. BROWN, EMIL BELICH, HARRY LACEY and JOHN STANTON, within three years prior to the date of the finding of this indictment in said County of Kanawha, before the felony was committed in form aforesaid, to-wit: within three years prior to the date of the finding of this indictment and in the County aforesaid, did feloniously counsel with, aid and abet the said RUTH MALEY

to do and commit the said felony in said Kanawha County in the manner and form aforesaid, against the peace and dignity of the State.

Found at the January Term of said Court, 1965, upon the information of James B. McIntyre, Security Building, Charleston, W. Va., sworn in open Court and sent before the Grand Jury to give evidence to that body.

CHARLES M. WALKER
Prosecuting Attorney.

APPENDIX II

PETITION FOR WRIT OF PROHIBITION FILED MARCH 23, 1965, IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel JAMES V. BROWN,

Petitioner,

v. PETITION FOR WRIT OF PROHIBITION

WILLIAM J. THOMPSON, Judge
of the Intermediate Court of
Kanawha County, West Virginia, and
CHARLES M. WALKER, Prosecuting
Attorney of Kanawha County, West Virginia,

Respondents.

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

The undersigned petitioner respectfully represents unto the Court the following:

1. That he was indicted at the January 1965 Term of the Intermediate Court of Kanawha County, West Virginia, on the 18th day of January, 1965, for a felony, the indictment charging your petitioner as follows:

"119.

"State of West Virginia, Kanawha County, ss:

"IN THE INTERMEDIATE COURT OF SAID COUNTY:

"The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, that

within three years prior to the date of the finding of this indictment, in the County of Kanawha, State of West Virginia, RUTH MALEY, being then and there an employee, officer, clerk and agent of the State of West Virginia, did knowingly, unlawfully and feloniously make and cause to be made false entries in the written accounts kept by the State of West Virginia by preparing and submitting, and causing to be prepared and submitted, false transmittal sheets in writing accompanied by false statements and invoices in writing for Pioneer Construction Co., Inc., a corporation, to the Auditor of the State of West Virginia, which said written accounts, statements, invoices and transmittal sheets were kept by the said State of West Virginia, with intent in so doing to falsify, alter and conceal the true state of said written accounts against the peace and dignity of the State.

"And the Grand Jurors upon their oaths aforesaid do further present that ALEX DANDY, JAMES V. BROWN, EMIL BELICH, HARRY LACEY and JOHN STANTON, within three years prior to the date of the finding of this indictment in said County of Kanawha, before the felony was committed in form aforesaid, to-wit: within three years prior to the date of the finding of this indictment and in the County aforesaid, did feloniously counsel with, aid and abet the said RUTH MALEY to do and commit the said felony in said Kanawha County in the manner and former aforesaid, against the peace and dignity of the State.

"Found at the January Term of said Court, 1965, upon the information of

James B. McIntyre, Security Building, Charleston, W. Va. sworn in open Court and sent before the Grand Jury to give evidence to that body.

CHARLES M. WALKER
Prosecuting Attorney."

2. The petitioner invokes the jurisdiction of this Court under the authority of Chapter 53, Article 1, Sec. 1 et seq. of the West Virginia Code, and does hereby seek to prohibit the trial of his case upon the indictment heretofore set out herein and does further seek to prohibit the trial of his case upon any purported charges set out in said indictment.

3. The trial of your petitioner, upon the indictment found against him, is now scheduled for Wednesday, March 24, 1965, at 9:30 o'clock a. m., in the Intermediate Court of Kanawha County, West Virginia.

4. Petitioner respectfully further alleges and says that in no event should he be required to be tried upon the charge as made against him in said indictment; in that

(a) the indictment charges your petitioner with no crime or offense cognizable either under the common law or under the laws and statutes of the State of West Virginia;

(b) that the indictment fails to allege and charge a crime;

(c) that there is no crime of aiding and abetting the commission of the felony alleged against the principal defendant Ruth Maley;

(d) that no statute of the State of West Virginia creates the crime of aiding and abetting the offense set out in West Virginia Code, Chapter 61, Article 3, Section 22, under which statute this petitioner was indicted;

(e) that West Virginia Code, Chapter 61, Article 11, Section 6, and Chapter 61, Article 11, Section 7, having to do with punishment of principals in the second degree and accessories and the prosecution of accessories, do not create any criminal offense under the statute of the State of West Virginia;

(f) that said Intermediate Court of Kanawha County, West Virginia, is wholly without jurisdiction to try this petitioner under said purported indictment, that said indictment is void, there being no crime existent within the State of West Virginia as is charged against your petitioner herein;

(g) that the said Intermediate Court of Kanawha County, West Virginia, is wholly without jurisdiction and

will be exceeding its jurisdiction and authority to try this petitioner in violation of his constitutional rights, one of such violations being to require petitioner to go to trial on March 24, 1965, not having adequate time to prepare said case for trial;

(h) that said indictment is wholly void for failing to allege whether the defendant was present or absent at the time he is charged with either aiding and abetting or being an accessory before the fact;

(i) that said indictment fails to fully and plainly inform the accused of the charge against him in violation of the Constitution of the United States and the Constitution of the State of West Virginia and the Amendments hereto respectively.

5. The said petitioner, prior to March 22, 1965, was in no wise notified as to when he would be tried. On Monday, March 22, 1965, Arthur T. Ciccarello, Esquire, his only attorney of record, was notified that the State of West Virginia intends to proceed against your petitioner on Wednesday, March 24, 1965, and that he would be tried on said charge at that time; and unless prohibited by this Honorable Court petitioner will be tried upon said indictment, before said Court on the 24th day of March, 1965.

That as of Monday morning, March 22, 1965, when petitioner's counsel, Arthur T. Ciccarello, was notified by the respondent Trial Judge that the trial upon the indictment here involved would be had on Wednesday, March 24, 1965, said Arthur T. Ciccarello thereupon advised the Court that he was presently engaged in trial in the Circuit Court of Kanawha County, West Virginia, which trial could not possibly end before Wednesday, March 24, 1965, and that even if the trial ends on Wednesday, March 24th, he would like to have some time to prepare the instant case for trial and requested that the respondent Trial Judge not set the same for trial until at least Monday, March 29, 1965, which request was refused by said Trial Judge. That up to that time counsel for petitioner, Arthur T. Ciccarello, had no other person assisting him in the preparation for the trial of this

case nor any other counsel to assist him in the trial of the same, and petitioner had not employed any other counsel so to assist or try said case. That after said case was set for trial on March 24, 1965, petitioner employed Stanley E. Preiser on the 22nd day of March, 1965, to assist in the preparation of this case which was the first contact said Stanley E. Preiser had wtih said case, and it would be impossible for Stanley E. Preiser to properly prepare said case for trial and try same before Monday, March 29, 1965.

That to require petitioner to go to trial upon this indictment on March 24, 1965, would be tantamount to depriving petitioner of counsel in violation of the United States Constitution and the Constitution of the State of West Virginia both as amended.

That such procedure on the part of the respondent Prosecuting Attorney's office, and the respondent Trial Judge, representatives of the State of West Virginia, in failing to disclose to this petitioner or his attorney the date he would be tried, sufficiently in advance to the proposed trial date, constitutes a violation of your petitioner's right under the Sixth Amendment to the Constitution of the United States of American, wherein it is provided:

> "In all criminal prosecutions ,the accused shall enjoy the right . . . to have the assitance of counsel for his defense."

that said rights guaranteed by the Sixth Amendment to the Constitution of the United States of America, includes the right to effective counsel and pre-supposes that counsel for any accused shall have sufficient and adequate and ample time to properly prepare the defense of such accused.

All as is shown in the hereto attached affidavits of Arthur T. Ciccarello and James V. Brown, petitioner, marked for identification Petitioner's Exhibits A and B, respectively, and expressly asked to be made a part hereof.

6. Petitioner says that he is an attorney at law, licensed to practice within the State of West Virginia, and has so practiced for a number of years, although he is now presently residing without the State and in the District of Columbia; that many

years of time and inestimable amounts of money, or money's worth, have been expended by him in obtaining his education and training for his profession as attorney; that likewise much time and expense have been incurred by him in building for himself a good and ethical reputation and esteem, not only among the clients he has served but among his many friends and business associates; that he is married and is the father of three (3) children; that he is about to be and will be, unless this Honorable Court shall intervene by way of prohibition, unjustly be tried upon a charge which in no wise constitutes any crime and upon an indictment which charges no crime; that such trial, if had, will of necessity result further in the embarrassment, humiliation, public redicule and ruin of his professional life and career, and, to a degree, that of his wife and children; and will, if had, cause him additional and unnecessary expense and anguish; that there is no other adequate or available remedy by which he can prevent the respondent Trial Judge and respondent Prosecuting Attorney from exceeding their jurisdiction and authority, to his irreparable harm, injury and detriment, except by this prayer for writ of prohibition.

7. That petitioner has a clear legal right to the relief prayed for herein.

Your petitioner therefore prays that a rule may be awarded against the said William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, to show cause if any one, or either of them can, why a writ of prohibition should not be awarded to your petitioner, prohibiting the said William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, from proceeding further in said action; that a writ of prohibition be awarded to your petitioner prohibiting the said William J. Thompson and Charles M. Walker from continuing to exceed their authority and jurisdiction and from trying this petitioner under said indictment, and to show cause why the indictment found against your petitioner should not be dismissed; that a writ of prohibition be awarded to your petitioner against the respondents

prohibiting respondents from placing this petitioner upon trial under said indictment until adequate time is allowed your petitioner to prepare for the defense of said case being at the earliest March 29, 1965; that an Order be entered by this Honorable Court suspending the proceedings herein sought to be prohibited until the final decision of this Court, and for such other further and general relief and Orders as the Court might deem appropriate to a just decision in this cause.

JAMES V. BROWN
By Counsel

/s/ ARTHUR T. CICCARELLO,
Counsel for Petitioner
L & S Building, Quarrier Street
Charleston, West Virginia

/s/ STANLEY E. PREISER,
Counsel for Petitioner
Third Floor Union Building
Charleston, West Virginia

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

JAMES V. BROWN, petitioner after having been first duly sworn says that the facts and allegations contained in the hereto annexed petition for writ of prohibition are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein stated to be upon information and belief, he believes them to be true.

/s/ JAMES V. BROWN

Taken, subscribed and sworn to before the undersigned, this 22 day of March, 1965.

/s/ GLOE L. McCURDY
Notary Public within and for Kanawha
County, West Virginia.

My commission expires September 17, 1969.

PETITIONER'S EXHIBIT A.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

This day personally appeared before the undersigned authority, ARTHUR T. CICCARELLO, who, after having been first duly sworn according to law, upon his oath, deposes and says, that prior to March 22, 1965, he was employed by James V. Brown to defend him in the Intermediate Court of Kanawha County, West Virginia, in matters arising out of an indictment found against the said James V. Brown at the January 1965 Term of the Grand Jury of Kanawha County, West Virginia; that prior to March 22, 1965, he had not been advised the trial date of said case; that on Monday, March 22, 1965, the Judge of the Intermediate Court of Kanawha County, West Virginia, set the case of James V. Brown for trial beginning on Wednesday, March 24, 1965; that this affiant advised said Court that he was presently trying a case in the Circuit Court of Kanawha County, West Virginia, and that said case would probably not be completed until Wednesday, March 24, 1965, but said Court refused his request that the case against James V. Brown be set for Monday, March 29, 1965, in order for this affiant to properly prepare the same for trial; that thereafter on March 22, 1965, the said James V. Brown employed Stanley E. Preiser as co-counsel in the preparation and trial of his case which was the first contact the said Stanley E. Preiser had with said case, and that it is impossible for this affiant and Stanley E. Preiser to properly prepare this case for trial and try same before Monday, March 29, 1965.

/s/ ARTHUR T. CICCARELLO

Taken, subscribed and sworn to before the undersigned by Arthur T. Ciccarello this 22 day of March, 1965.

My commission expires September 17, 1969.

GLOE L. McCURDY
Notary Public

PETITIONER'S EXHIBIT B.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

This day personally appeared before the undersigned authority, JAMES V. BROWN, who, after having been first duly sworn according to law upon his oath, deposes and says, that prior to March 22, 1965, he had employed Arthur T. Ciccarello to defend him in the Intermediate Court of Kanawha County, West Virginia, in matters arising out of an indictment found against him by the January 1965 Term of the Grand Jury of said County, that prior to March 22, 1965, he had not been advised the date his case was to be heard in said Court; that on March 22, 1965, the Intermediate Court Judge of Kanawha County, West Virginia, set his trial on Wednesday, March 24, 1965, and said Court was advised by Arthur T. Ciccarello, his attorney, that the said Arthur T. Ciccarello was presently trying a case in the Circuit Court of Kanawha County, West Virginia, and that said case would not be completed until Wednesday, March 24, 1965, but said Court set his trial on Wednesday, March 24, 1965; that thereafter, on March 22, 1965, he employed Stanley E. Preiser as co-counsel in the preparation and trial of his case in Intermediate Court of Kanawha County, West Virginia, but affiant verily believes and therefore avers that there is not sufficient time to properly prepare his case for trial, it being set for trial on Wednesday, March 24, 1965.

/s/ JAMES V. BROWN

Taken, subscibed to and sworn to before the undersigned this 22 day of March, 1965.

My commission expires September 17, 1969.

/s/ GLOE L. McCURDY
Notary Public

APPENDIX III

RULE TO SHOW CAUSE

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 23rd day of March, 1965, the following order was made and entered, to-wit:

State of West Virginia ex rel. James V. Brown, Relator

12448 vs. Prohibition

William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondent

On this day came the State of West Virginia at the relation of James V. Brown, by Stanley E. Preiser and Arthur T. Ciccarello, his attorneys, and presented to the Court his petition, and exhibits, and note of argument in support thereof, praying for a writ of prohibition to be directed against William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, as therein set forth. Upon consideration whereof, a majority of the Court is of opinion that a rule should be awarded herein.

It is therefore considered and ordered by a majority of the Court that a rule do issue, directed against William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, returnable before this Court at its court room in the City of Charleston, County of Kanawha, at ten o'clock a. m., on Tuesday, April 27, 1965, commanding and directing the said respondents to show cause, if any they can, why a writ of prohibition should not be awarded against them as prayed for by the relator in his said petition.

It is further considered and ordered that all proceedings in the trial court, sought to be prohibited herein, be, and the same are hereby suspended until the final adjudication of this proceeding in this Court.

Service of a copy of this order upon the respondents, William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, together with a copy of the petition, and exhibits, filed herein, shall have the same effect as the service of a formal rule, and to suspend all proceedings in the trial court aforesaid. Judges Calhoun and Berry would deny the rule.

A True Copy

Attest: /s/ KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX IV

WRITTEN OPINION OF THE SUPREME COURT OF WEST VIRGINIA

No. 12448

STATE EX REL. JAMES V. BROWN

v.

WILLIAM J. THOMPSON, JUDGE OF THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA, ET AL.

In Prohibition — Writ denied

Haymond, Judge

1. There is a clear distinction between the crime of accessory before the fact and the crime of aiding and abetting. An accessory before the fact must be absent at the time and place of the principal offense. An aider and abettor is a person who is present at the time and place of the commission of the principal offense.

2. An accessory before the fact is a person who being absent at the time and place of the crime, procures, counsels, commands, incites, assists or abets another person to commit the crime, and absence at the time and place of the crime is an essential element of the status of an accessory before the fact.

3. An accessory must be indicted as such whether indicted with the principal felon or separately.

4. To justify the conviction of a person as an accessory before the fact it must appear that he advised and agreed or urged or in some way aided a person to commit the offense, that he was not present when the offense was committed, and that the principal committed the offense.

5. By the common law, when a statute creates a new felony persons who are present and aid and abet a person who actually

commits the offense are principals; and persons who counseled the offense but are absent at the time and persons who afterward assist the felon to elude justice are accessories before or after the fact.

6. By Article VIII, Section 21 of the Constitution of this State and Section 1, Article 1, Chapter 2, Code, 1931, the common law is in force in this State insofar as it is not repugnant to the principles of the Constitution and except in those respects in which it has not been altered by the Legislature; and at common law an aider and abettor or an accessory is subject to criminal responsibility in connection with the commission of an offense by a principal felon.

7. By the common law and the law of this State an accessory or an aider and abettor is guilty of a criminal offense if he counsels, procures or commands another person to commit a statutory offense which was also an offense at common law or a statutory offense which was not an offense at common law, or plans, cooperates, assists, aids or abets in the commission of any such offense.

8. By Section 7, Article 11, Chapter 61, Code, 1931, an accessory before or after the fact is subject to criminal responsibility and may be indicted, convicted and punished for a crime in the county in which he became accessory or in the county in which the principal felon might be indicted if the accessorial acts occur in that county.

9. Any person who is capable of committing a crime may be guilty as a principal in the second degree and the fact that he is incompetent to commit an offense as a principal in the first degree does not preclude him from being a principal in the second degree.

10. A person may be guilty as an accessory before the fact although he or she is incompetent to commit the crime in person.

11. An indictment which charges a principal in the first degree with the commission of the crime created by Section 22,

Article 3, Chapter 61, Code, 1931, and which also charges that certain other persons before the commission of the principal offense did feloniously counsel with, aid and abet the principal in the first degree to do and commit the principal offense satisfies the constitutional requirement that in all trials the accused shall be fully and plainly informed of the character and cause of the accusation and is a good and sufficient indictment of the persons charged with being accessories before the fact to the crime created by the statute.

Haymond, Judge:

In this original prohibition proceeding instituted in this Court on March 23, 1965, the petitioner, James V. Brown, seeks to prohibit the defendants, Honorable William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Honorable Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, from prosecuting him upon an indictment for a felony returned by the grand jury of the Intermediate Court of Kanawha County, West Virginia, at the Regular January 1965 Term of that court, which indictment charged Ruth Maley, as principal, with the crime of falsifying certain written accounts kept by the State of West Virginia and preparing and submitting certain false written transmittal sheets to the Auditor of this State, with intent to falsify such written accounts, in violation of Section 22, Article 3, Chapter 61, Code, 1931, and Alex Dandy, the petitioner James V. Brown, Emil Belich, Harry Lacey and John Stanton with having counseled with, aided and abetted Ruth Maley to commit such offense in Kanawha County, West Virginia.

Upon the filing of the petition this Court issued a rule returnable April 27, 1965, at which time this proceeding was heard and submitted for decision upon the petition and its exhibits, the joint and several answer of the defendants and its exhibit, and the written briefs and the oral arguments of the attorneys in behalf of the respective parties.

The material facts are not disputed and the questions presented for decision are questions of law.

The indictment against the petitioner and others as defendants, the sufficiency of which is challenged by the petitioner in this proceeding, is based upon Section 22, Article 3, Chapter 61, Code, 1931, and, omitting the name of the appearing witness and the signature of the prosecuting attorney, is in this form:

"State of West Virginia, Kanawha County, ss:

"IN THE INTERMEDIATE COURT OF SAID COUNTY:

"The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, that within three years prior to the date of the finding of this indictment, in the County of Kanawha, State of West Virginia, RUTH MALEY, being then and there an employee, officer, clerk and agent of the State of West Virginia, did knowingly, unlawfully and feloniously make and cause to be made false entries in the written accounts kept by the State of West Virginia by preparing and submitting, and causing to be prepared and submitted, false transmittal sheets in writing accompanied by false statements and invoices in writing for Pioneer Construction Co., Inc., a corporation, to the Auditor of the State of West Virginia, which said written accounts, statements, invoices and transmittal sheets were kept by the said State of West Virginia, with intent in so doing to falsify, alter and counsel the true state of said written accounts against the peace and dignity of the State.

"And the Grand Jurors upon their oaths aforesaid do further present that ALEX DANDY, JAMES V. BROWN, EMIL BELICH, HARRY LACEY and JOHN STANTON, within three years prior to the date of the finding of this indictment in said County of Kanawha, before the felony was committed in form aforesaid, to-wit: within three years prior to the date of the finding of this indictment and in the County aforesaid, did feloniously counsel with, aid and abet the said RUTH MALEY to do and commit the said felony in said Kanawha County in the manner and form aforesaid,

"against the peace and dignity of the State."

The petitioner contends that the foregoing indictment is fatally defective in that it fails to charge him with the commission of any offense under the laws of this State and that inasmuch as it charges him with being both an accessory before the fact and an aider and abettor in connection with the commission of the offense by Ruth Maley, as principal, the indictment fails fully and plainly to inform the petitioner of the character and cause of the accusation against him. The petitioner insists that as the indictment is void for the foregoing reasons his prosecution under it should be prevented by a writ of prohibition.

On the contrary the defendants insist that the indictment sufficiently charges the petitioner with being an accessory before the fact in connection with the offense committed by Ruth Maley, as principal; that it fully and plainly informs the petitioner of the character and cause of the accusation against him and is in all respects a valid and sufficient indictment for the offense with which it charges the petitioner.

The petitioner insists that, as the statute which creates the offense with which Ruth Maley is charged in the indictment does not create the crime of an accessory or an aider and abettor in connection with the commission of that particular offense, a person who is such accessory or such aider and abettor, in the absence of such statute, does not commit any offense under the law of this State. He also asserts that there is no general statute of this State which makes it a crime for any person to be an accessory or an aider and abettor in the commission of an offense and that for that reason such accessory or such aider and abettor does not commit any offense under the law of this State. Though it is true that Section 22, Article 3, Chapter 61, Code, 1931, does not expressly make it an offense for any person to be an accessory or an aider and abettor in the commission of the particular offense and though it is also true that there is no general statute of this State which makes it an offense for any person to be an aider and abettor in the commission of any specific offense, it does not follow that the failure of the statute creating the specific offense set forth in the indictment to impose criminal responsibility excludes such accessory or aider and abettor from such responsibility or that to act as accessory or aider and abettor

does not constitute a criminal offense. Moreover action by the Legislature in providing with respect to certain specific crimes dealt with by statute such as kidnapping, Section 14(d), Article 2, Chapter 61, Code, 1931, as amended, arson, Section 1, Article 3, Chapter 61, Code, 1931, as amended, and policy or numbers, Section 11(a), Article 10, Chapter 61, Code, 1931, as amended, that any person who aids or abets the person who actually commits any of the foregoing crimes shall be guilty of a felony does not indicate or mean that the failure of any statute to provide for the guilt of an accessory or an aider and abettor excludes such person from criminal responsibility. On the contrary a person is guilty as a principal in the second degree when he aids and abets the actual perpetrator or the principal in the first degree, in the commission by such perpetrator of a common law offense which is also a statutory crime and is also guilty of an offense when he is an accessory before the fact, even though the statute creating the crime does not make aiding and abetting or accessory before the fact in the commission of the statutory crime a separate or substantive offense. If a statute makes an act a crime it includes with the principal felon all persons who are aiders and abettors or who are accessories before or after the fact. *Adkins* v. *Commonwealth*, 175 Va. 590, 9 S. E. 2d 349, 131 A. L. R. 1312. Statutory felonies admit of accessories to the same extent as did felonies at common law and the failure of the statute to mention an accessory does not exempt him from criminal responsibility. 22 C. J. S., Criminal Law, Section 81a.

It is well established, at common law and by numerous decisions of this Court and of the Supreme Court of Appeals of Virginia, that a person who is the absolute perpetrator of a crime is a principal in the first degree and that a person who is present, aiding and abetting the fact to be done, is a principal in the second degree. Book Four, Chapter The Third, page 34, Blackstone's Commentaries on the Laws of England; 22 C. J. S., Criminal Law, Sections 83, 85 and 88(1); *State* v. *Garcia*, 140 W. Va. 185, 83 S. E. 2d 528; *State* v. *Franklin*, 139 W. Va. 43, 79 S. E. 2d 692; *State* v. *Digman*, 121 W. Va. 499, 5 S. E. 2d 113; *State* v. *Martin*, 112 W. Va. 88, 163 S. E. 764; *State* v. *Wamsley*, 109 W. Va. 570, 156 S. E. 75; *State* v. *Powers*, 91 W. Va. 737, 113 S. E. 912; *State* v. *Bailey*, 63 W. Va. 668, 60 S. E. 785; *State* v. *Cremeans*,

62 W. Va. 134, 57 S. E. 405; *State* v. *Roberts*, 50 W. Va. 422, 40 S. E. 484; *Tacker* v. *Commonwealth*, 202 Va. 1019, 121 S. E. 2d 459; *Snyder* v. *Commonwealth*, 202 Va. 1009, 121 S. E. 2d 452; *Sloan* v. *Commonwealth*, 199 Va. 877, 102 S. E. 2d 278; *Spradlin* v. *Commonwealth*, 195 Va. 523, 79 S. E. 2d 443; *Foster* v. *Commonwealth*, 179 Va. 96, 18 S. E. 2d 314; *Brown* v. *Commonwealth*, 130 Va. 733, 107 S. E. 809, 16 A. L. R. 1039.

In Book Four, Chapter The Third, page 34, Blackstone's Commentaries on the Laws of England, the author says: "1. A man may be *principal* in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he is who is present, aiding, and abetting the fact to be done. Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance." And the same author at page 35 states that "II. An *accessory* is he who is not the chief actor in the offence, nor present at it's performance, but in someway concerned therein, either *before* or *after* the fact committed."

In 22 C. J. S., Criminal Law, Sections 83, 85 and 88(1), are these statements:

Section 83: "The principal in the first degree is he that is the actor or actual and immediate perpetrator of the crime, and this is true of course whether the crime is a felony or a misdemeanor."

Section 85: "A principal in the second degree, or an aider and abettor as he is frequently called, is one who is present actually or constructively, aiding and abetting in the commission of the felony; one who so far participates in the commission of a crime as to be present for the purpose of assisting therein, if necessary; one who gives aid and comfort, or who either commands, advises, instigates, or encourages another to commit a crime; * * *: a person who, by being present, by words or conduct, assists or incites another to commit the criminal act.

"In order to avoid the technicalities of the law encountered under the ancient authorities which regarded persons aiding and abetting in the commission of a crime as accessories at the fact, aiders and abettors were early held to be principals in the second degree." See Commonwealth v. Knapp, 9 Pick 496 (Mass.). 20 Am. Dec. 491.

"Aiding and abetting is not an independent crime under 'aider and abettor' statutes, and the acts which constitute the basis of a charge of aiding and abetting must be acts which tend to the commission of some substantive offense. Accordingly, in order that one may be a principal in the second degree or aider and abettor, the general rule is that it is essential that there be a crime committed and a principal in the first degree, and it must be shown that the person for whom accused was acting was connected with the offense. * * *. Where, however, the crime of aiding and abetting is by statute made a substantive offense one may be prosecuted as a principal, although the person or corporation aided and abetted may not have participated in the unlawful act and may not be chargeable with knowledge thereof."

Section 88(1): "All persons who are actually or constructively present at the time and place of a crime, whether it is a felony or merely a misdemeanor, and who either actually aid, abet, assist, or advise its commission, or are there with that purpose in mind, to the knowledge of the person actually committing the crime, are guilty as principals in the second degree or aiders and abettors or as 'principals' under applicable statute, although they did not themselves accomplish the purpose. Conduct which amounts to aiding and abetting of the crime by accused at the time and place of its commission is, however, essential to guilt as a principal in the second degree or aider and abettor."

In *State* v. *Franklin*, 139 W. Va. 43, 79 S. E. 2d 692, this Court held in point 3 of the syllabus that "A person who is present, aiding and abetting another in the commission of an offense, is a principal in the second degree * * *." In *State* v. *Wamsley*, 109 W. Va. 570, 156 S. E. 75, this Court said in point 1 of the syllabus that two or more persons may be charged in an indictment with the commission of a crime, such as rape, which from its nature

could, in fact, have been committed by but one, and that those who are present, aiding and abetting its commission, are principals in the second degree, and indictable and punishable, under our Code and practice, as principals in the first degree. In *State* v. *Bailey,* 63 W. Va. 668, 60 S. E. 785, this Court said in point 8 of the syllabus that "If the actor, the person who performs the manual act incident to the crime, had felonious intent in the performance thereof, or knew the act was criminal, he is a principal in the first degree; and the person at whose instigation he acted is either a co-principal in the first degree or a principal in the second degree, if he was actually or constructively present, but, if not present in either sense, he is an accessory before the fact."

There is a clear distinction between the crime of accessory before the fact and the crime of aiding and abetting. An accessory before the fact must be absent at the time and place of the principal offense. *State* v. *Davis,* 139 W. Va. 645, 81 S. E. 2d 95; *State* v. *Roberts,* 50 W. Va. 422, 40 S. E. 484. An aider or abettor is a person who is present at the time and place of the commission of the principal offense. *State* v. *Davis,* 139 W. Va. 645, 81 S. E. 2d 95; *Foster* v. *Commonwealth,* 179 Va. 96, 18 S. E. 2d 314. An accessory before the fact is a person who being absent at the time and place of the crime, procures, counsels, commands, incites, assists, or abets another person to commit the crime, and absence at the time and place of the crime is an essential element of the status of an accessory before the fact. *State* v. *Loveless,* 140 W. Va. 875, 87 S. E. 2d 273. A conspirator who is absent at the time a felony is committed who takes no part in the actual commission of the offense, is an accessory before the fact and must be indicted and punished as such. *State* v. *Roberts,* 50 W. Va. 422, 40 S. E. 484. In the opinion in that case this Court said "An accessory must be indicted as such whether indicted with the principal felon or separately. In *State* v. *Lilly,* 47 W. Va. 496, (35 S. E. 837), syl. pt. 2, 'Under the laws of this State, to convict a person as an accessory to crime he must be indicted and tried as such.' And in *Hatchett's Case,* 75 Va. 925, it is held, 'An accessory to a felony cannot be proseeuted for a substantive principal offense, but only as an accessory to the crime perpetrated by the principal felon.' *Thornton's* Case, 24 Grat. 657,

'An accessory before the fact to a felony cannot be convicted on an indictment against him as principal.'" See also *State* v. *Powers*, 91 W. Va. 737, 113 S. E. 912; *State* v. *Cremeans*, 62 W. Va. 134, 57 S. E. 405.

In *Adkins* v. *Commonwealth*, 175 Va. 590, 9 S. E. 2d 349, 131 A. L. R. 1312, the opinion contains these quotations from Bishop, Statutory Crimes, Second Edition, Sections 135, 139 and cases cited: "'At common law all persons present giving aid and comfort to another committing an offense, even a felony, are regarded as principals. Therefore, if a statute makes the doing of the thing criminal it includes, with the actual doer, persons who are present lending their countenance and aid. * * * Whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law. In other words, the statute is to be interpreted after the rules and incidents of the common law * * *. When a statute creates a new felony, whether out of what was before innocent, or was a misdemeanor, those who are aiding one who personally commits it are principals.'" See also *State* v. *Derosia*, 94 N. H. 228, 50 A. 2d 231; Bishop, Statutory Crimes, Third Edition, Section 139; 16 C. J., Criminal Law, Section 100; 22 C. J. S., Criminal Law, Section 81.

In several instances in which a common law crime has by statute of this State been made a felony, such as rape, larceny and murder, as to which latter offense an aider and abettor was criminally liable at common law as principal in the second degree, according to Blackstone's Commentaries on the Laws of England, Book Four, Chapter The Fourteenth, page 200, and which statute, making rape, larceny or murder a felony, does not make aiding and abetting in the commission of any of such crimes a separate or substantive offense, this Court has held that a person who aids and abets the principal in the first degree who actually perpetrates the criminal act, is subject to criminal liability as a principal in the second degree. *State* v. *Franklin*, 139 W. Va. 43, 79 S. E. 2d 692; *State* v. *Digman*, 121 W. Va. 499, 5 S. E. 2d 113; *State* v. *Martin*, 112 W. Va. 88, 163 S. E. 764; *State* v. *Wamsley*, 109 W. Va. 570, 156 S. E. 75; *State* v. *Powers*, 91 W. Va. 373, 113 S. E. 912; *State* v. *Prater*, 52 W. Va. 132, 43 S. E. 230.

In *State* v. *Franklin*, 139 W. Va. 43, 79 S. E. 2d 692, in which the defendant was indicted for the crime of rape and in which his conviction for the offense of attempted rape was reversed and set aside, this Court held in point 3 of the syllabus that "A person who is present, aiding and abetting another in the commission of an offense, is a principal in the second degree within the meaning of Code, 61-11-6, which provides, in part: 'In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree.' " In the opinion with reference to Section 6, Article 11, Chapter 61, this Court said: "Section 6, however, does not deal with crime itself; nor does it provide that one who acts as a principal in the second degree, or an accessory before the fact, in the commission of a crime shall be guilty of a crime: it simply provides that one who acts in the capacity of, and by his actions has acquired the status of, a principal in the second degree or an accessory before the fact in the commission of a felony, shall be punishable as if he did the physical act of committing the felony, that is, he shall be punishable as if he were the principal in the first degree." Although that statute does not expressly provide that one who acts as a principal in the second degree or as an accessory before the fact in the commission of a crime shall be guilty of a crime, this Court in the *Franklin* case recognized the criminal liability at common law of one who aids and abets the acts of the perpetrator of a criminal offense by this language in the opinion: "The case at bar involves a principal who, under the evidence, if he acted at all in a criminal way, aided and abetted the principal perpetrator of the crime. Under the evidence in this case, the jury should have found the defendant guilty of rape as principal in the second degree or not guilty."

In *State* v. *Digman*, 121 W. Va. 499, 5 S. E. 2d 113, in which the defendant, the husband of the woman who was raped by another man, was indicted and convicted as a principal in the second degree for being present and aiding and abetting in the commission of the offense, this Court upholding the conviction of the husband of the crime of rape, stated in point 3 of the syllabus that "A husband may be guilty as principal in the second degree of raping his wife under Code, 61-2-15."; and in

the opinion used this language: "By an examination of the authorities, we reach the conclusion that our statutory definition of the crime of rape is nothing more than an adoption of the integral parts of the common law definition. For this reason, because at common law a man could be guilty as principal in the second degree of raping his own wife, we are of the opinion that that rule is equally applicable under our statute."

In the North Carolina case of *State* v. *Jones,* 83 N. C. 605, 35 Am. Rep. 586, in which a woman who was present aiding and abetting a male who committed an assault with intent to commit rape of another woman, was convicted as a principal, the opinion contains this language: "At common law, rape was a felony, and the rule was, that all persons who were present aiding, abetting and assisting a man to commit the offense, whether men or women, were principal offenders and might be indicted as such, or if not present in a legal sense, they might be guilty as accessories before or after the fact."

In *State* v. *Wamsley,* 109 W. Va. 570, 156 S. E. 75, in which the conviction of the defendant of the crime of rape was affirmed by this Court, the opinion contains this language: "At common law persons present aiding and abetting, where rape is a felony, are principals equal in guilt with the direct perpetrator. Bish. Crim. Law (9th Ed.) sec. 1135. Mr. Bishop further says in Crim. Proc., sec. 6(a): 'It is not ill to charge the principal of the second degree with what he cannot do alone, where he can incur the legal guilt by aiding the principal of the first degree; as, that a man and woman, two defendants, ravished another woman. * * *. All persons who were present aiding and abetting the commission of the fact are principals in the second degree at common law and may be charged in the indictment as having done the act. 1 Russel on Crimes, pp. 26-29. The same author says in the 7th English edition, at page 114: 'Where several are present and abet a fact, an indictment may lay it generally as done by all, or specially, as done by one and abetted by the rest. Or if the punishment for principals in the first and second degrees is the same, all may be indicted as principals in the first degree.' Our statute makes provision for the punishment of the principal of the second degree the same as if we were principal in the first degree. Code, chapter 152, section 6."

In *State* v. *Prater*, 52 W. Va. 132, 43 S. E. 230, in which the defendant was jointly indicted as one of three persons for murder and in which it appeared that the defendant at the time of the killing committed no act of violence and was present only for the purpose of aiding, if need be, the person who actually did the killing, the conviction of the defendant for the lesser offense of voluntary manslaughter was affirmed by this Court. After reciting certain facts shown by the evidence, this Court in the opinion said: "From these facts the jury were warranted in drawing the inference that the accused knew the death of Conley was then and there to be accomplished by his son; that the accused had counseled and directed it, and that he was upon the ground fully prepared and intending to aid in the consummation of it, if necessary. The finding of such facts made the accused a principal in the second degree whether a conspirator or not. 'The distinction between principal and accessory before the fact is this: The principal is the one who actually does the criminal act, or participates in the doing of it, whether actually or only constructively present, or who is actually present at the time of the doing of it, aiding and abetting; while the accessory is one who has such connection with the crime, by reason of preparation, procurement, advice, or encouragement, as to be deemed criminally liable therefor, but does not participate in the final commission of the crime and is not present thereat.' McClain Cr. Law, s. 204. The author distinguishes here between principal and accessory without distinguishing between principal of the first degree and principal of the second degree. In the next section this latter distinction is made, and of the principal in the second degree, he says, 'To constitute this form of connection with the offense, the accused must have been present when the offense was committed, although, as will be seen in the next paragraph, this presence may be constructive. Mere presence, however, is not enough without some form of participation. But those who, being present, aid and abet, or are present for that purpose, although, they actually do no wrongful act whatever, are principals in the second degree." See also *State* v. *Martin*, 112 W. Va. 88, 163 S. E. 764; *State* v. *Powers*, 91 W. Va. 737, 113 S. E. 912.

With respect to accessories before the fact the text in 22 C. J. S., Criminal Law, Section 90, contains these statements:

"An accessory before the fact is one who was not present actually or constructively, at the time when the felony was committed, but who counseled, procured, or commanded another to commit it, or who planned, cooperated, assisted, aided, counseled, or abetted in the preparation of it; and he is equally guilty with the principal. Aiding, abetting, and planning the commission of a felony have been held to constitute the substance of the crime, and there is no particular time to which accessaryship is limited. One may be an accomplice and a co-conspirator with another as an accessory before the fact. An accessory before the fact may be described as a confederate.

"A person may be an accessory before the fact and also a principal in the commission of a crime. One may also be guilty as an accessory before the fact, by aiding in, or procuring or instigating a crime, although he or she is incompetent to commit the crime in person. In order that this may be true, however, there must, of course, be a crime committed and a principal in the first degree.

"There are several elements that must concur in order to justify the conviction of one as an accessary before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them, to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime."

In *State* v. *Loveless,* 140 W. Va. 875, 87 S.E. 2d 273, in which the conviction of the defendant as an accessory before the fact to the crime of murder of the first degree as well as the imposition of a sentence of death was reversed by this Court because of error in admitting certain evidence and the action of the trial court in extensively interrogating certain witnesses, the opinion contains this language:

"It is well to note that an accessory before the fact may be convicted '* * * whether the principal felon be convicted or not, or be amenable to justice or not, * * *'. Code, 61-11-7. Further,

'* * * and every accessory before the fact shall be punishable as if he were the principal in the first degree; * * *'. Code, 61-11-6.

"At this point, it is to be noted that the defendant in this case was indicted and tried separately as an accessory before the fact.

"Accessory before the fact, conspirator and accomplice are terms which are somewhat connected, but not exactly the same from a legal standpoint. An accessory has been defined as: 'One, who, being absent at the time a crime is committed, yet assists, procures, counsels, incites, induces, encourages, engages, or commands another to commit it.' Black's Law Dictionary, Fourth Edition, page 29. '* * * An accessory is he who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the fact committed. * * *' *State* v. *Roberts,* 50 W. Va. 422, 40 S.E. 484. Absence at the time and place the offense is committed is the essential element to make one an accessory, the connivance and the result aimed at must occur, and the latter must be the effect of the former to complete the crime. *State* v. *Ellison,* 49 W. Va. 70, 38 S.E. 574.

"* * *

"The offense of accessory is of two grades: accessory before the fact, and accessory after the fact. We are here concerned only with the former. "An accessory before the fact is he that, being absent at the time of the actual perpetration of the crime procures, counsels, commands, incites or abets another to commit it." * * * The crime of accessory before the fact is a particular one. The absence of the accessory at the time and place of the principal offense is an essential element. * * *' *State* v. *Roberts, supra.*"

The statute creating the crime of murder, which was a felony at common law, does not impose or create criminal liability upon an accessory before the fact to the crime of murder, but notwithstanding the absence of any such provision in that statute this Court in the *Loveless* case recognized and considered accessory before the fact to the crime of murder of the first degree

to be a felony and to be punishable in the same manner as a principal in the first degree.

In *State* v. *Davis*, 139 W. Va. 645, 81 S.E. 2d 95,in which the defendant was indicted, tried and convicted as an accessory before the fact to the statutory crime of abortion, the statute creating that crime did not expressly make accessory to that crime a substantive offense. This Court, however, recognized accessory before the fact to the statutory crime of abortion to be a substantive offense and though the conviction of the defendant was reversed because the evidence was not sufficient to support it, this Court said that it was not error to try the defendant on an indictment which charged him with being an accessory before the fact to the statutory crime of abortion.

In the opinion in *State* v. *Roberts*, 50 W. Va. 422, 40 S.E. 484, in discussing the status of an accessory before the fact, this Court said: "The crime of accessory before the fact is a particular one. The absence of the accessory at the time and place of the principal offense is an essential element of the crime. Sir Mathew Hale defines the accessory before the fact to be 'One who being absent at time of the crime committed doth yet procure, counsel, or command another to commit a crime. Wherein absence is necessary to make him an accessory.'"

In 22 C.J.S., Criminal Law, Section 81a, are these statements: "It is now well settled that statutory felonies admit of accessaries to the same extent as did felonies at common law; and the fact that the statute mentions nothing about accessaries is immaterial. A statutory felony, even though the offense at common law was a misdemeanor, will admit of accessaries." See also *State* v. *Derosie*, 94 N. H. 228, 50 A. 2d 231.

In Clark and Marshall, Crimes, Third Edition, 1927, Section 31e, the text is expressed in this language: "Statutes defining and punishing offenses are also to be construed in accordance with the common law principles in relation to principals and accessories."

The text in Bishop, On The Unwritten Law, Chapter XVII, Section 139, contains these statements: "When a statute creates

a new felony, whether out of what was before innocent, or was a misdemeanor, those who are present aiding one who personally commits it are principls, as already said; and the absent who counselled it, and those who afterward assist the felon to elude justice, are parties in felonies at the common law."

In *The Queen* v. *Tracy,* 6 Mod. 31, 87 English Reports 795 (Reprint), a criminal prosecution against Tracy, a Justice of the Peace, for falsely arresting a person on a forged warrant and extorting various sums of money, before Holt, Chief Justice, and Powell, Jusice, the opinion by the chief justice states that "if a thing be made felony, all accessaries before and after are felons in consequence; * * *."; and in *Dominus Rex* v. *Bear,* 2 Salkeld 417, 91 English Reports 363 (Reprint), in which the defendant was indicted, tried and convicted for the offense of criminal libel, the opinion contains these statements: "If H. contrives any treasonable matter, and another writes down the contrivance, the writer is as guilty as the inventor. Where an Act of Parliament makes *sodomy* felony, and says nothing of the abettors, if B. should stand by and hold the door while A. committed *sodomy,* B. would be as guilty of felony as A. So in 3 Inst. 59, where an Act of Parliament makes any thing felony, though nothing be said of the accessaries in the statute. So in the lowest offences, where there are no accessaries, but all are principals, as if H. should hold A. while B. beats him, he is guilty of the battery."

Although accessory before the fact was a crime at common law accessory before or after the fact is made a substantive offense by Section 7, Article 11, Chapter 61, Code, 1931, which provides that "An accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted, and punished in the county in which he became accessory, or in which the principal felon might be indicted. Any such accessory before the fact may be indicted with such principal or separately." The statute not only makes a person who acts as an accessory before or after the fact guilty of a criminal offense but also fixes the venue for the trial of the offense. In *Moore* v. *Lowe,* 116 W. Va. 165, 180 S.E. 1, in discussing the status of an accessory before the fact, this Court said: "An accesory before the fact is not the principal actor in

the crime, nor present at its commission, but is one who, in some manner, procures or instigates its performance. IV Blackstone's Commentaries, p. 35; 1 Wharton's Criminal Law (12th Ed.), Sec. 263; 1 Ruling Case Law, p. 144; *State* v. *Ellison*, 49 W. Va. 70, 38 S.E. 574; *State* v. *Roberts*, 50 W. Va. 422, 40 S.E. 484. One accused as accessory before the fact must be indicted as such and not for the offense committed by the actual perpetrator of the crime—the principal in the first degree. *State* v. *Powers*, 91. W. Va. 737, 747, 113 S.E. 912; *State* v. *Lilly*, 47 W. Va. 496, 35 S.E. 837. But an accessory before the fact, though thus indicted and prosecuted, is punishable in the same manner as a principal in the first degree. Code, 61-11-6."

In the *Moore* case, in discussing the statute, Section 7, Article 11, Chapter 61, Code, 1931, this Court used this language: "The common law requirement that the principal be convicted before the prosecution of the accessory could proceed, has been changed in this state by statute. Code, 61-11-7. An accessory, before or after the fact, may now be prosecuted whether the principal has been brought to justice or not. In this sense, at least, the crime of accessory before the fact becomes in this state a substantive offense. It, of course, remains contingent upon the fact of the commission of the principal offense. * * *."

By Article VIII, Section 21 of the Constitution of this State and Section 1, Article 1, Chapter 2, Code, 1931, the common law is in force in this State so far as it is not repugnant to the principles of the Constitution and except in those respects in which it has been altered by the Legislature; and at common law an aider and abettor or an accessory is subject to criminal responsibility in connection with the commission of a crime by a principal felon.

From the numerous authorities cited and discussed earlier in this opinion relating to the criminal responsibility of an aider and abettor and an accessory, it is clear that by the common law and the law of this State an accessory or an aider and abettor is guilty of criminal offense if he counsels, procures or commands another person to commit a statutory offense which was also an offense at common law or a statutory offense which was not an

offense at common law, or plans, cooperates, assists, aids or abets in the commission of any such offense. It is also clear that by Section 7, Article 11, Chapter 61, Code, 1931, an accessory before or after the fact is subject to criminal responsibility and may be indicted, convicted and punished for a crime in the county in which he becomes accessory or in the county in which the principal felon might be indicted if the accessorial acts occur in that county. *Moore* v. *Lowe,* 116 W. Va. 165, 180 S.E. 1; *State* v. *Overholt,* 111 W. Va. 417, 162 S.E. 317. See also *Well* v. *Slack,* 76 W. Va. 685, 86 S.E. 666; *Watts* v. *The State,* 5 W. Va. 532.

The crime created by Section 22, Article 3, Chapter 61, Code, 1931, and for which the petitioner has been indicted, was created by a statute of Virginia in 1849 and has been in effect in this State for many years. It has been considered by this Court in only one prior decision in 1948. *State* v. *Rouzer,* 127 W. Va. 392, 32 S.E. 2d 865. In that case this Court said that the statute does not relate exclusively to officers, clerks or agents of the State or its subdivisions but that it also applices to officers, clerks or agents of any banking institution or other corporation; and that the offense which it creates may be committed by an agent or clerk who falsifies, mutilates, destorys or conceals a book of accounts or an account kept by any public or private employer. The Court held that the statute applies only to written memorials purporting to show items of business transactions for or against those having contractual or fiduciary relations with each other, and that the mere failure of an officer, clerk or agent of a board of education to keep an account of receipts and disbursements in a business conducted by him for the board does not constitute an offense under the statute. Though the statute creates the foregoing particular offense a similar offense, that of falsifying a public account by a public official was a punishable offense at common law; and one Charles Bembridge, holding the office and place of accountant, receiver and paymaster general, was convicted of that offense in the case of *The King* v. *Bembridge,* 3 Douglas 327, 99 English Reports 679 (Reprint), decided in November 1783, in which Lord Mansfield and Justices Willes and Buller heard and decided the case and rendered a judgment against the defendant of six months imprisonment and a fine of 2650 pounds.

The statute, Section 22, Article 3, Chapter 61, Code, 1931, which creates the offense for which the petitioner was indicted, limits its scope to officers, clerks and agents of the designated instrumentalities, and the petitioner, not being charged in the indictment as such officer, clerk or agent and not being within the scope or purview of the statute, can not be guilty of its violation as the principal felon and the actual perpetrator of the criminal act. That fact, however, does not relieve the petitioner of criminal responsibility for its violation as an aider and abettor and as such a principal in the second degree, or as an accessory before the fact. Any person who is capable of committing a crime may be guilty as a principal in the second degree and the fact that he is incapable of committing an offense as a principal in the first degree does not preclude him from being a principal in the second degree. 22 C. J. S., Criminal Law, Section 85; *State* v. *Digman,* 121 W. Va. 499, 5 S. E. 2d 113; *Commonwealth* v. *Weldon,* 159 Pa. Super. 447, 48 A. 2d 98. In the *Digman* case a husband who could not have committed the crime of raping his wife was indicted and convicted as a principal in the second degree for aiding and abetting the commission by another man of the crime of raping the wife of the husband who aided and abetted the principal felon in the commission of the offense. In the *Weldon* case the opinion, referring to Clark and Marshall, Law of Crimes, contains this language: "The general rule is thus stated by Clark and Marshall in Law of Crimes, p. 257, § 191: 'Any person who is capable of committing a crime may be guilty as a principal in the second degree or accessory before or after the fact; and it can make no difference that, by reason of age, sex, condition, or class, he or she is incompetent to commit the crime as principal in the first degree.'" *People* v. *Young,* 132 Cal. App. 770, 23 P. 2d 524; *State* v. *Rowe,* 104 Iowa 323, 73 N. W. 833; *Commonwealth* v. *Mannos,* 311 Mass. 94, 40 N. E. 2d 291; *People* v. *Chapman,* 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; *State* v. *Jones,* 83 N. C. 605, 35 Am. Rep. 586; *State* v. *Fraser,* 105 Ore. 589, 209 P. 467; *State* v. *Case,* 61 Ore. 265, 122 P. 304; *State* v. *Sprague,* 4 R. I. 257; *Campbell* v. *State,* 63 Tex. Cr. Rep. 595, 141 S. W. 232, Ann. Cas. 1913 D 858; *Quillin* v. *State,* 79 Tex. Cr. Rep. 497, 187 S. W. 199, 5 A. L. R. 773; *Adkins* v. *Commonwealth,* 175 Va. 590, 9 S. E. 2d 349, 131 A. L. R. 1312; *Law* v. *Commonwealth,* 75 Va.

885, 40 Am. Rep. 750. Neither is the petitioner exempt from liability as an accessory before the fact because he is incompetent to commit the crime as principal in the first degree. As already pointed out, a person may be guilty as an accessory before the fact, by aiding in, or procuring or instigating a crime although he or she is incompetent to commit the crime in person. 22 C. J. S., Criminal Law, Section 90; *People* v. *Wallin*, 32 Cal. 2d 803, 197 P. 2d 734; *State* v. *Burns*, 82 Conn. 213, 72 A. 1083, 16 Ann. Cas. 465; *Bishop* v. *State*, 118 Ga. 799, 45 S. E. 614; *State* v. *Elliott*, 61 Kan. 518, 59 P. 1047; *State* v. *Nahoum*, 172 La. 83, 133 So. 370; *People* v. *McKane*, 143 N. Y. 455, 38 N. E. 950. In *State* v. *Nahoum*, 172 La. 83, 133 So. 370, the court held that one who could not embezzle corporate funds because not an officer or employee of the corporation may be charged as an accessory before the fact to the crime of embezzlement. In the opinion in that case the court, citing 1 Ruling Case Law, Section 7, said: "There are many offenses which can only be committed by particular classes of the community: Bigamy by married persons; rape, seduction, and bastardy by males; larceny after trust by bailees; embezzlement by officers. But because one cannot be a principal it by no means follows that he cannot be punished as an aider and abettor." See also *Bishop* v. *State*, 118 Ga. 799, 45 S. E. 614.

The indictment in this case, which is challenged by the petitioner, sufficiently charges the petitioner with the offense of accessory before the fact to the commission of the principal offense. The language of the indictment indicates clearly that the petitioner and his associates performed the accessorial acts before the commission of the felony by the principal in the first degree and were not present when the offense was committed by such principal. As previously stated, an accessory before the fact is one who was not present at the time of the commission of the felony but who counseled, procured, or commanded another to commit it or who planned, cooperated, assisted, aided, or abetted in the perpetration of the offense. The language of the indictment which charges that the petitioner and his named associates "did feloniously counsel with, aid and abet the said RUTH MALEY to do and commit the said felony",

sufficiently describes and charges the petitioner as an accessory before the fact.

The indictment does not fail to inform the petitioner fully of the charge against him. On the contrary it fully satisfies the requirement of Article III, Section 14 of the Constitution of this State that in all trials the accused shall be fully and plainly informed of the character and cause of the accusation. An indictment which charges a principal in the first degree with the commission of the crime created by Section 22, Article 3, Chapter 61, Code, 1931, and which also charges that certain other persons before the commission of the principal offense did feloniously counsel with, aid and abet the principal in the first degree to do and commit the principal offense satisfies the constitutional requirement that in all trials the accused shall be fully and plainly informed of the character and cause of the accusation and is a good and sufficient indictment of the persons charged with being accessories before the fact to the crime created by the statute.

For the reasons stated and under the authorities cited and discussed in this opinion, the writ of prohibition prayed for by the petitioner is denied.

Writ denied.

APPENDIX V

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DISCHARGING THE RULE AND DENYING WRIT OF PHOHIBITION

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of June, 1965, the following order was made and entered, to-wit:

State of West Virginia ex rel. James V. Brown, Relator

12448 vs. Prohibition

William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondents

The Court, having maturely considered the petition and exhibits, the rule awarded thereon, the respondents' answer to relator's petition, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that the relator is not entitled to the writ of prohibition prayed for in his said petition. It is therefore considered and ordered by the Cout that the writ of prohibition prayed for in this proceeding be, and the same is hereby denied and the rule heretofore awarded is discharged, and that the respondents do recover of and from the relator their costs in this Court in this behalf expended.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Judge Haymond, was concurred in by Judges Browning, Calhoun, Berry and Caplan.

A true Copy

Attest: /s/ KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX VI

ORDER OF SUPREME COURT OF APPEALS OF WEST VIRGINIA SUSPENDING PROCEEDINGS

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd day of June, 1965, the following order was made and entered, to-wit:

State of West Virginia ex rel. James V. Brown, Relator

12448 vs. Prohibition

William J. Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles M. Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondents

On this day, June 22, 1965, came the relator, James V. Brown, by Stanley E. Preiser, his attorney, and presented to the Court his motion in writing to suspend the execution of the judgment entered June 15, 1965, and the mandate of this Court, pending an application to the Supreme Court of the United States for an appeal from the final judgment of this Court of June 15, 1965, denying relator a writ of prohibition and discharging the rule heretofore awarded, pursuant to the provisions of the Code, Chapter 58, Article 5, Section 31.

Upon consideration whereof, the Court is of opinion to grant the motion. It is therefore considered and ordered that the execution of the judgment entered June 15, 1965, and the mandate of this Court be suspended for a period of ninety days from June 15, 1965, in order to permit the aforesaid relator to apply to the Supreme Court of the United States for an appeal or writ of certiorari herein; but this order is not to take effect until the said relator, or some person for him, shall have given before the Clerk of this Court bond with good personal security in the

penalty of FIVE HUNDRED Dollars, conditioned as provided by Section 31, Article 5, *Cahpter* 58 of the Code.

A True Copy

Attest: /s/ KENNETH E. HINES
Clerk Supreme Court of Appeals